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IN THE

Supreme Court of the United States

October Term, 1997

BRUCE GIANNETTI,

Petitioner,

-v-

DOREEN DEOCK

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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QUESTION PRESENTED

Where a child's custody was continued with the mother although the evidence and the lower courts' rulings demonstrated that the father was the better parent, the trial proceedings demonstrated a marked bias in favor of the mother, and there is a pervasive societal bias in favor of awarding child custody to women rather than men, was the award of custody to the mother a denial of equal protection in violation of the 14th Amendment?

PARTIES

The names of all parties to the proceeding in the Court whose Judgment is sought to be reviewed here appear in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

OPINIONS BELOW

The opinion and judgment of the Superior Court of New Jersey, Appellate Division, appears in Appendix A hereto at A1 to A7. The Order of the Supreme Court of New Jersey denying certification on the petition for certification of the judgment appears in Appendix A hereto at A8. The opinion and judgment of the Superior Court of New Jersey, Family Part, Passaic County, appears in Appendix A hereto at A9 to A61. The decisions of the Superior Court of New Jersey, Appellate Division, the Superior Court of New Jersey, Family Part, and the Supreme Court of New Jersey are all unreported.

JURISDICTION

The order of the Supreme Court of New Jersey was entered on April 24, 1997. This Petition for Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, Section 1: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The petitioner father was denied equal protection of the laws when his application for a change of child custody from the respondent mother to himself was denied. This conclusion is supported by: a) clear evidence in the trial record, confirmed by the court rulings, that petitioner is the more fit parent; b) numerous indications in the trial record of a bias against petitioner father apparently resulting from a gender-based preference for maternal custody; and c) a pervasive societal bias in favor of maternal custody. The evident discriminatory intent motivating the continuing of custody with respondent requires that the judgment be overturned on equal protection grounds.

Petitioner Bruce Giannetti ("father") and respondent Doreen Ruth Deock ("mother") were married in New Jersey in April, 1972, and moved to Georgia in May, 1973 (9/15/94:20).[1] Their child, Regan, was born on January 29, 1985 in Georgia (9/15/94:28). By separation agreement and a May 23, 1986 Georgia judgment of divorce, custody of Regan was awarded to the mother, who had returned to New Jersey, with the father granted visitation, including one week visitation per month. (9/15/94: 32; PA: 131, 165). On June 25, 1991 the father filed a petition in New Jersey Superior Court, Family Division, seeking a determination of the best interests of the child and which parent should have custody (PA: 1). Interim relief was denied, and the case was assigned to Judge Margaret Mary McVeigh.

The Trial

Judge McVeigh conducted an in camera interview of Regan on May 20, 1994 (PA: 210), and testimony was taken over the course of three weeks, with the court's oral decision delivered on December 1, 1994 (A: 9)

On the day of Regan's interview her father appeared in the courthouse to talk with his daughter and provide emotional support. Ms. Deock, however, argued with Mr. Giannetti over his being there and Ms. Deock's mother pulled Regan away from her father before they could converse. Ms. Deock then had an ex parte discussion with Judge McVeigh, the contents of which have never been disclosed, and the Judge ordered Mr. Giannetti from the courthouse (7/14/94: 14).

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1. References marked by a date are to the corresponding date of the trial court proceedings. References marked "PA" are to the petitioner's appendix in the Superior Court of New Jersey, Appellate Division. References marked "A" are to the Appendix attached hereto.

Witnesses at the hearing included three expert psychological witnesses. Two, with credentials which the court found "inspiring" in one case and "equally as impressive" in the other (A: 21, 24), testified that Regan's interests clearly would be better served by custody with her father. The third, whose credentials were "[c]learly....not as impressive nor as extensive" (A:25), felt that custody should continue with Ms. Deock.[2] The Gwinnett County, Georgia Department of Family and Children Services reported that Mr. Giannetti's daughter "appeared to be his main personal priority," and that "anyone to whom he [was] committed would receive the full measure of his time and energy" (PA: 41). The Georgia Department of Probation did not investigate Regan's relationship with Ms. Deock, but did conclude that "the benefits Mr. Giannetti can provide and is willing to provide his child should be given considerable consideration" in the custody determination (PA: 41). A Passaic County Probation Officer who testified that custody should be continued with the mother was found by the court to be defensive, with convoluted logic and reasoning, and her testimony was found unpersuasive (A:21).

There also was considerable testimony about a child abuse report investigated by New Jersey Division for Youth and Family Services after Regan, during a telephone conversation with her father, told him that her mother's sister yelled at her, hurt her, dug her nails in her arm, swore at her, and put her hand over her mouth when she cried (9/20/94: 8,9). The trial court essentially discounted this report of abuse, except to fault Mr. Giannetti for causing the investigation to be initiated (A:50).

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2. The first two experts were retained by Mr.. Giannetti, the third was a court witness.

The Custody Determination

The trial court ultimately elected to continue custody with the mother, slightly increasing the father's visitation (A:52-53).

Mr. Giannetti appealed to the Superior Court of New Jersey Appellate Division. In summarizing the factors bearing on custody, the court stated:

> We acknowledge the fact that the child ...clearly expressed to the judge her preference to live in Georgia and told the father's expert that she wanted to live with her father. We further understand that this might have been influenced by the fact that the father is of greater means than the mother, has a lovely suburban home with a play room, and apparently provides more material things for his daughter ...However, we have also noted that the father spends more time with his daughter... and he appears to take a more genuine interest in her activities. The mother has turned over many of her parenting duties to her family and spends a good deal of her time with her boyfriend, to the exclusion of the daughter. The father, on the other hand, includes Regan in activities with his girlfriend. On the negative side, however, the evidence reveals that the father has in the past refused to alter his visitation schedule to permit his daughter to do things important to her, such as attend birthday parties and otherwise participate in events with her own friends. The father was characterized as "single-purposed" and "when challenged... is a force to be

> reckoned with," but "when he is happy he will give his all to someone."

(A: 2-3).

In spite of these findings, the Appellate Division agreed with the trial judge's reason for continuing the mother's primary residential custody, noting:

> such a change [in custody] would have required the child to move to Georgia, with the mother unable to spend any significant period of time with her child. Even though the father offered to pay for all transportation, the child would either be repeatedly torn from her friends and activities or the mother would be forced into being a weekend visitor. This is true in too many cases, usually with the father placed in this unenviable position.

(A: 5)

The New Jersey Supreme Court denied certification of Mr. Giannetti's appeal, foreclosing any further avenue of relief in the New Jersey courts (A:8)

Preservation of the Equal Protection issue in the State Court

After Regan's interview but before the start of the trial, petitioner filed a motion which requested, *inter alia,* a recital on the record of the court's reasons for not asking each of the questions submitted by Mr. Giannetti for Regan's May 20 interview, and a statement of the reasons for the judge's complete denial of a motion for various relief which had been submitted in July (PA: 166). In his affidavit in support of this motion, Mr. Giannetti stated that it was "obvious that even my former mother-in-law is more important in the eyes of the Court than I, the natural father...," cited "inequity in this matter" (PA:

169), pointed out numerous instances of favorable treatment given his wife during the proceeding, demanded that the court "give me the same rights as it gave my former wife..." (PA: 188), and concluded by stating: "I guess its [sic] obvious that Judge McVeigh, my daughter and my former wife our [sic] 'we girls'. Where does that leave me? Its [sic] obvious that Judge McVeigh feels that girls must stick together and have to take care of themselves" (PA: 196).

Judge McVeigh, in her decision, referred to "many references to the system being prejudiced against the father or Mr. Giannetti specifically in this custody battle" and "[a]llegations of specific bias by myself with regard to Mr. Giannetti's veracity or his gender" (A: 13). The trial court rejected these claims, expressing its "firm belief that this system struggles in the best way that it can to [be] fair[] and just[]," and stated, "This Court values fairness...to all parties above anything else....This Court will not allow extraneous issues to impact at all upon my ultimate determination" (A: 13-14).

Point I of petitioner's brief to the Appellate Division was headed "Violation(s) by the Court of the code of judicial conduct denied appellant's constitutional right to a fair hearing" (Petitioner's Brief to Appellate Division ["Brief"]: 29). Petitioner, referring to "[t]he constitutional cornerstone of 'equal protection,'" argued that the trial court violated Canon 3A. (4) of the Code of Judicial Conduct, quoting, "'A judge should be impartial and should not discriminate because of...sex...'" (Brief:35). Petitioner went on to discuss a series of the court's improper actions "on behalf of (the female) Plaintiff and counsel" (parenthetical in original), including one instance which, he alleged, "[m]ost incredibly, and unabashedly demonstrat[ed] sexual bias..." (Brief: 36, 37). The Appellate Division rejected these allegations in a short section of its opinion, stating, "the judge's comment...that '[t]he only thing

we girls have to take care of us are our brains and our ability to take care of ourselves' is not the objectionable sexist remark that is portrayed...Not all same-sex references by role models to young children violate the current vogue of political correctness" (A:4).

In his petition for certification to the New Jersey Supreme Court, petitioner argued that "Constitutional Guarantees of Equal Protection... Were Denied Mr. Giannetti" (Certification Petition: 12). Petitioner referred the New Jersey Supreme Court to his equal protection argument contained in his Appellate Division brief, and further argued that various specific actions in the trial court were based on his status as a father rather than a mother (Certification Petition:14)

REASON FOR GRANTING THE WRIT

THE RECORD OF THE NEW JERSEY COURTS IN THIS CASE SUGGESTS A BIAS IN FAVOR OF MATERNAL CUSTODY, AND THE COURTS' DECISIONS CAN BE EXPLAINED ONLY BY SUCH A BIAS. THIS EVIDENCE OF BIAS IS SUPPORTED BY AN UNQUESTIONED GENERAL PREFERENCE BY AMERICAN COURTS TO AWARD CUSTODY TO MOTHERS, BASED ON A SEX-BASED PRESUMPTION THAT MOTHERS MAKE THE BETTER PARENT. TOGETHER, THESE FACTS DEMONSTRATE THAT PETITIONER'S FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION OF THE LAW HAS BEEN VIOLATED IN THIS CASE.

I. Gender Bias in Judicial Custody Decisions-- "women are inherently better able to care for children than men... their ability to nurture is somehow biologically determined" *(Spotting Gender Bias in an Expert,* Family Advocate (ABA Family Law Section), Summer 1994, at 14)

This case addresses the assumption pervading the courts of this country that mothers naturally make the best parents. The result of this assumption is that courts normally award custody to the mother absent a compelling reason to deny it. The reliance on this assumption of course violates the Equal Protection clause of the Fourteenth Amendment, but because the assumption permeates the court system at the trial and appellate level it is difficult to address within a particular case.

This maternal bias has a long history following the

reversal of the traditional Anglo-American view of the right of the father to the custody of his children. Goldstein & Fenster, *Anglo-American Criteria for Resolving Child Custody Disputes from the Eighteenth Century to the Present: Reflections on the Role of Socio-Cultural Change, 19 Journal of Family History 36-37 (1994).* The tender years doctrine, providing a preference for maternal custody for young children, evolved in the 19th Century, initiating a turn toward a preference for maternal custody for children of all ages. Then, "over a period of about 50 years beginning about 1920, the courts tended... to award custody to the mother in the absence of known factors regarded as grossly disqualifying..." *Id.* at 39-40.

Current statistics show an overwhelming predominance of maternal custody. In a study of family court records in two New Jersey counties, 96% (Essex) or 94% (Bergen) of sole custody awards were to the mother. Shier, Simring, Brief, Shapiro, & Lindenthal, *Child Custody Arrangements; a Study of Two New Jersey Counties,* Spring 1989 Journal of Psychiatry & Law 9, 14. Similar results were reported by Greer Litton Fox and Robert F. Kelly, based on their own study in Wisconsin and two other studies in counties in California and Michigan. Fox & Kelly, *Determinants of Child Custody Arrangements at Divorce,* 57 Journal of Marriage and the Family 693, 700 (1995). In Wisconsin, sole physical custody was awarded to mothers 88.5% of the time and to fathers 9.2% of the time; in California sole physical custody was awarded to mothers 67.2% of the time and to fathers 8.6% of the time; in Michigan sole physical custody was awarded to mothers 88.6% of the time and to fathers 9.5% of the time. *Id.*

Broader studies have reported similar results. Of 15 reporting states in 1989, child custody was awarded to the mother in 72% of the cases and to the father in 9.6%, and of 19 reporting states in 1990, custody was awarded to the mother in

72.5% of cases and to the father in 10.3%. 43 Monthly Vital Statistics Reports, No. 9(S), Table 18 (U.S. Department of Health and Human Services, March 22, 1995).

A coded study in California did not find a sex-based link in custody decisions, but did find a significant link to counselor recommendations. Kunin, Ebbesen & Konecni, *An Archival Study of Decision-Making in Child Custody Disputes,* 48 Journal of Clinical Psychology 564 (1992). Since the counselors recommended maternal custody 42% of the time to 30% for paternal custody, and the judges almost invariably followed this recommendation, *id.* at 567-68, the counselors' preference for maternal custody resulted in a like preference in final decisions. This is not surprising, since experts who provide recommendations in custody cases share the bias "that women are inherently better able to care for children than men, that their ability to nurture is somehow biologically determined." Reubins, Marc S., M.D., *Spotting Gender Bias in an Expert,* 17 Family Advocate (ABA Family Law Section), Summer 1994 ["Family Advocate"] at 14.

Various state studies of gender bias in the courts have found sex-based assumptions in child custody decisions. A Utah task force found a "categorization of men as less capable and less appropriate caretakers than women," and a New York task force said "men are perceived as uninvolved parents who must explain their reasons for seeking custody whereas women are seen as natural parents whose desire for custody is not only acceptable but expected." Lynn Hecht Schafran, *Gender Bias in Family Courts,* Family Advocate at 22, 26. This attitude results from the stereotypical view held by "judges, domestic relations commissioners, family services officers, and custody evaluators...that women belong in the domestic sphere of the home, providing care to young and old..."*Id.* As a result, "physical custody to the mother is still the default award across

the country." Abraham, Jed H., *Why Men Fight For Their Kids,* Family Advocate at 48, 50.

The present case presents a rare opportunity for this Court to address the issue of gender bias in custody determinations: petitioner complained about gender bias at the trial and all appellate levels, and the record so overwhelmingly supports an award of custody to Mr. Giannetti that the award of custody to the mother can only be explained by gender bias. Furthermore, this conclusion of gender bias is further supported by specific incidents at the trial court which strongly suggest that the judge was predestined to decide against the father in this custody proceeding.

II. The proceedings in the trial court-- "I like to spend more time with my dad. He spends more time with me than anyone"

Even preliminary to Regan's interview on May 20, 1994, Judge McVeigh demonstrated her view of the mother as the proper care giver. Were she acting on the assumption that both parents were equal care givers, she would have found nothing wrong with Mr. Giannetti's presence at the courthouse to provide support to his young daughter before this potentially trying interview.[3] Ms. Doeck's immediate anger at Mr. Giannetti's presence was the more inappropriate parental response; after all, Regan's mother was present so why shouldn't her father be present as well. Instead, the court, after an ex parte discussion with Ms. Doeck, took the mother's side while ordering Mr. Giannetti to leave the courthouse (7/14/94: 14).

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3. Mr. Giannetti was also scheduled to pick up his daughter that night for his regular weekend visitation (PA: 230).

Judge McVeigh's interview of Regan, by questions asked and unasked, demonstrated her intent to continue maternal custody by producing an interview which would justify that result. Regan's first remark bearing on the custody issue was "I like to spend more time with my dad. He spends more time with me than anyone" (PA: 218). Judge McVeigh immediately tried to bolster the mother's standing, suggesting that her work made it difficult for her to spend so much time with Regan. Regan instead explained that she was deprived of maternal care and attention because her mother spent time with her boyfriend, "always go[ing] out with him...and sometimes my mom doesn't come home." Rather than explore this abandonment of the child, Judge McVeigh, assuming maternal custody would continue, asked if Regan wanted to change her mother's behavior in the future. The judge's preconceived expectation that custody should be with the mother was highlighted by her next question, "If that [the mother's staying with the boyfriend to Regan's exclusion] didn't happen, would you like to spend more time with your mom?" (PA:218).

Perhaps recognizing that this question showed her bias Judge McVeigh withdrew it, but proceeded to seek further affirmation of the appropriateness of maternal custody. She asked Regan what she liked best about her mother and when Regan answered "we can go shopping. Just the girls," the judge repeated "just the girls" and urged upon Regan the need for a same sex relationship with her custodian so Regan could "talk about girl things" (PA:218).

Regan burst this justification for maternal custody, explaining that she and her mother did not have such conversations, "Not--not anymore" (PA:218). Rather than accept this response as further evidence of Ms. Deock's inappropriateness as the sole custodial parent, and explore with Regan how extensive was her abandonment by her mother,

Judge McVeigh herself immediately ameliorated the response by rephrasing it as "Not enough?", to which Regan replied "right" (PA: 218). Thus the judge continued a pattern of turning Regan's complaints about her mother's absolute and complete neglect into small problems, which the judge then could resolve while maintaining maternal custody.

Judge McVeigh's failure to take an interest in Regan's description of her greater enjoyment in her relationship with her father further demonstrated the court's sexual bias. By contrast with her mother, Regan explained, her father "goes places with me and if he has like a girlfriend over I would go anywhere with them. It's like I'm right next to my dad anywhere he goes. It's just that when I'm with my mom it's like stay here, stay with grandma. But with my dad it's come with us" (PA: 219). Not only did Regan's response cry out for amplification, which the judge did not seek, but this critical contrast in parental concern and attention was ignored in the court's opinion, *see, infra at 18-19.*

The judge also failed to ask Regan anything about the sort of care she received when her mother left her with her aunt or grandparents while the mother was working or with her boyfriend. Some gentle probing in this area would appear to have been necessary, given the Division of Youth and Family Services (DYFS) investigation into Regan's statement that her aunt, Ms. Deock's sister, had yelled and sworn at her, and dug her nails in her arm (9/20/94:8). Although DYFS closed its investigation, the interview of Regan would have been an appropriate time to investigate the extent to which the complaint was demonstrative of the sort of care she was receiving, had Judge McVeigh not been so inclined to assume that a maternal care giver was inevitably the best custodian, even if she left the child with others who did not provide appropriate care.

When Regan further explained that she liked Georgia better than New Jersey (PA: 219), Judge McVeigh confounded this preference with the groundless concern that "if [Regan] went to Georgia...[she] couldn't see [her] mother" (PA: 220). As explained in both the Appellate Division and the trial court's decision, Mr. Giannetti offered to pay all the expenses of Ms. Deock's trips to Georgia or Regan's trips to New Jersey, if custody was awarded to him (A:5, 30). Judge McVeigh's expression of concern, like the portion of the Appellate Division decision to the same effect, establishes that in both courts' mind maternal custody which reduced contact with the father was preferable to paternal custody which reduced contact with the mother, regardless of the advantage of paternal custody. A starker presentation of gender bias could not be found.

Judge McVeigh tried to establish a further preference for New Jersey, pointing out that Regan had other family in the area. This attempt also failed when Regan explained that she didn't see her relatives there very much (PA: 220), even though she lived in New Jersey. On the other hand, while living with her mother, she was cut off from her paternal grandmother because "[her] mother won't allow [Regan] to call her," for reasons Ms. Deock has never explained and which Judge McVeigh never asked about (PA:221).

Unable to establish that Regan wanted to live with Ms. Deock, Judge McVeigh elicited from Regan the obvious--that Regan would prefer to have her parents not fighting and friendly, and would "want them to be together like a family" (PA: 221). Judge McVeigh relied on this throughout her opinion, treating as the key issue in the case eliminating the hostility between the parents (A:51-52, 56). The court supported its continuation of custody in the mother because the court did "not believe by changing custody, visitation complaints, and hostilities would end" (A:51). This was also

true about maintaining the current arrangements, and supports no preference for either maternal or paternal custody.

Another profound contrast revealed by Regan's interview, powerfully demonstrating that Mr. Giannetti was the more suitable guardian, was the area of discipline. If Regan's mother was mad at her, she would yell at her, send her to her room, spank her, and take privileges away (PA:222). Her father, on the other hand, would "tell [her] to stop it once and [she'll] stop it" (PA: 223). He never needed to punish her, even though he would tell her that there were things she couldn't do (PA: 223). The obvious follow-up by a judge truly interested in whose custody would best meet the child's interests, would be to find out why Regan was so obedient to her father, yet had to be spanked and otherwise punished by her mother. Instead, Judge McVeigh changed the subject after the briefest discussion of discipline, asking Regan about her toys and play. (PA: 223).

Although Judge McVeigh tried to establish that Regan's preference for her father was based on her mother's inability to buy her the treats her father could (PA: 225-26), Regan made it clear that she wasn't spoiled by her father (PA: 226).

Judge McVeigh's concluding advice to Regan that "[t]he only thing we girls have to take care of us are our brains and our ability to take care of ourselves" (PA: 228-29) might, in a neutral context, simply be "sincere advice from a successful female judge to a young girl" and "as unobjectionable as similar avuncular advice might have been from a male judge to a young boy," as described by the Appellate Division (A:4). This statement on its face showed the judge's view that "we girls" are at bay in a hostile environment and females therefore must learn to fend for themselves. In the context of the interview of Regan, and in view of the judge's hostility to the father during the proceedings, this remark is simply further evidence to be considered on the issue of sex-based bias.

During the interview Judge McVeigh failed to explore clear evidence of a grounded preference for custody with Mr. Giannetti, based on real signs of a closer relationship, more successful discipline, and the father's stronger concern for his daughter. She also failed to explore clear evidence of significant problems in Regan's relationship with her mother, despite specific questions submitted by petitioner directly addressing problems in maternal care.[4] Although Judge McVeigh was not required to ask all the questions propounded by petitioner (A:3), these questions would have provided a neutral judge with guidance to follow up Regan's remarks about, e.g., how she didn't speak with her paternal grandmother because her mother, for no reason, prohibited her from doing so (PA: 220-21). In short, the interview with Regan was deliberately cut short in significant areas which might demonstrate that custody with the father should be preferred.

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4. The submitted questions included who usually helped Regan with her homework, who took her to school and other activities, whether her mother (or father) let her call various other relatives and friends or took her to visit other relatives or friends (PA: 54-57).

II. The decisions of the trial court and Appellate Division -- "he appears to take a more genuine interest in her activities."

A. The Trial Court Decision

Despite the judge's control of the interview it still strongly supported paternal custody, and the import of the interview was ignored in the court's decision. Judge McVeigh's decision, by ignoring the critical facts in the record, and weighting all considerations in favor of maternal custody, demonstrated her gender bias.

The judge dismissed Regan's preference for living with her father by assuming without evidence that Regan merely was succumbing to Mr. Giannetti's forceful and dominating personality. (A: 50-51).[5] Indeed, the judge gives way to total speculation, utterly without support in the record. She suggests that "[i]t certainly would make sense to Regan...that the easiest path in this case would be to give custody of Regan to Bruce" (A:50). "This Court does not believe at this point in her development that Regan could say no to her father. This court does not think if Regan wanted to call her mother against her father's wishes that she would feel she could do that" (A:51). There is no support anywhere for this analysis of Regan's relationship with her father -- indeed, it is totally lacking in the expert testimony at trial, even that of the expert who recommended maternal custody, where it would most likely appear. To the contrary, Regan's preference for paternal custody was obviously based on the fact that her father spent

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5. Even the description and emphasis on Mr. Giannetti's character as forceful and dominant, "typical" male characteristics, demonstrates the gender bias underlying the judge's decision.

time with her and welcomed her into his activities, while her mother shunted her off to other care givers.

There is also not a shred of evidence for the judge's implicit finding that Mr. Giannetti would prohibit Regan from calling her mother, or even suggest to Regan that he would prefer she didn't. Indeed, the only evidence of one parent preventing contact with the other is on the other side, with Ms. Deock and her family discouraging Regan from calling her father, and directing her to a telephone in the basement, when the child had a broken ankle, to make those calls (PA:42-43).

The court, discussing the issue of "parental alienation" (A:45-47), ignores Ms. Deock's alienating conduct practically in her presence, when Regan, in her interview, told the judge her mother didn't want her father to be in the courthouse that day, and that her mother and grandmother took Regan away from her father when he tried to talk to her (PA:221). She ignored Regan's statements that she did not call her father's mother because her mother wouldn't allow her to call her (PA: 220-21). She ignored repeated attempts by Ms. Deock to keep Regan away from her father (9/15/94: 33-35, 43, 46, 63), going to the extreme of having Mr. Giannetti arrested when he picked up Regan for a scheduled visitation (9/15/94:70).[6] Yet the judge found that Mr. Giannetti's objective and truthful description of a possible school in Georgia, coupled with a mere visit to the school, was alienating, in some manner the judge did not explain (A:46).

Outrageously, the judge seized upon Regan's natural statement that she would be unhappy, in response to the judge's question, "What if you went to Georgia and you couldn't see your mother, " (PA:220), into a wholly unsupported statement

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6. Charges on this arrest were dismissed, and Mr. Giannetti was successful in a malicious prosecution lawsuit based on this arrest.

that Regan not being able "to call her mother from Georgia and expressing a concern...that if she lived in Georgia she would not be able to call her mother" was "paental alienation," when there was nothing in the record except the judge's question suggesting that Regan was not able to contact her mother while in Georgia (A:46-47). Indeed, in her interview, not surprisingly, Regan expressed equal concern about being cut off from either parent (PA: 228). Judge McVeigh invented the possibility that Mr. Giannetti would not permit Regan to call Ms. Deock if she lived in Georgia, then used this invention to charge Mr. Giannetti with parental alienation.

In clear demonstration that different factors were applied to paternal and maternal custody, the judge stated, "Regan being quizzed by her father with regard to her mother's relationship with another adult male is parental alienation" (A: 47). The portion of the interview "supporting" this statement, in full, was:

> Q: Let me ask you a question; does your mom ever ask you about your dad's girlfriend?
>
> A. Yes.
>
> Q. Does your dad ask about your mom's boyfriend?
>
> A. Yeah.
>
> Q. *They* drive you nuts; don't they?
>
> A. So many questions to answer.
>
> Q. And that makes you feel very unhappy.
>
> A. Yes.

(PA: 219) (emphasis added). The mother's questioning, identical to the father's, is ignored, and only the father is

determined to be "alienating" the daughter from her mother.

Although Judge McVeigh may have been correct that the major problem and issue in Regan's life was the hostility between the parents, and that a change in custody was unlikely to dissipate that hostility (A: 48-49), neither would a continuation of custody with the mother dissipate that hostility. Although the judge's concern about this hostility and desire to seek some resolution between the parents that would dissipate the hostility was commendable, this was totally irrelevant. The question before the court was which custody was in the best interests of the child, not how to eliminate the hostility between her parents. Regan's interview, the expert testimony, and the facts that "the father spends more time with his daughter... appears to take a more genuine interest in her activities," and, unlike the mother, includes Regan in activities with his new companion (A:2), establish that the clear answer to that question was paternal custody. Ignoring that clear answer, and totally ignoring the evidence in the record in support of that clear answer, is inexplicable except by gender bias.

B. The Appellate Division Decision

The judgment of the Appellate Division ignores its own opinion. The court acknowledged that Regan clearly expressed a preference to live in Georgia, and noted that Mr. Giannetti spent more time with Regan, and appeared to take a "more genuine interest in her activities," while Ms. Deock "turned over many of her parenting duties to her family" (A:2). Ms. Deock spent "a good deal of time with her boyfriend," excluding her daughter, while Mr. Giannetti "include[d] Regan in activities with his girlfriend" (A:2). The only counterbalance was that Mr. Giannetti had not altered his visitation schedule to permit his daughter to participate in certain activities because of his

"single-mindedness." Given that the more devoted parent had limited visitation, this is not surprising, and, given Mr. Giannetti's generous offer to pay the expenses of Ms. Deock's visitation, does not suggest that he would restrict Regan's contact with Ms. Deock and her family the way Ms. Deock has done with Mr. Giannetti.

The ultimate conclusion of the Appellate Division was based on an expressed gender preference. The expressed goal of the court was "to preserve maximum contact between the child and both of her parents". Because Mr. Giannetti could visit New Jersey and operate his business in New Jersey he could more easily have visitation in New Jersey. With custody in Georgia, the mother would be "unable to spend any significant period of time with her child. The Appellate Division then dismissed Mr. Giannetti's offer to pay for all of Ms, Deock's transportation because "the child would either be repeatedly torn from her friends and activities or the mother would be forced into being a weekend visitor"(A:5). Yet, apparently without recognizing the irony, the Appellate Division acknowledged that "[t]his is true in too many cases, usually with the father placed in the unenviable position". In the present case the father has been placed in this unenviable position, a position exactly identical to that which would be faced by Ms. Deock if custody was awarded to Mr. Giannetti with Mr. Giannetti paying for transportation, but with the child placed with the more suitable parent.

IV. The determination of bias

Of course, "the goal of granting custody based on the best interests of the child[7] is indisputably a substantial governmental interest for purposes of the Equal Protection Clause," and decisions involving child custody are subject to equal protection analysis. *Palmore v. Sidoti,* 466 U.S. 429, 433, 1104 S.Ct. 1879, 1882, 80 L.Ed.2d 421 (1984) (where State Court, making no finding that petitioner was an unfit parent, transferred custody to respondent because petitioner, a white woman, had married a black man, there was a denial of equal protection). The protections afforded by the 14th Amendment are not left at the courtroom door. *Hill v. Texas,* 316 U.S. 400, 406, 62 S.Ct. 1159, 1162, 86 L.Ed 2d 1559 (1942).

The problem in this case is how to address the claim of *de facto* bias by discretionary decision-makers, where no overt discriminatory intent is expressed. The problem is analogous to that found in *McCleskey v. Kemp,* 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed. 2d 262 (1987), where the Court was presented with a claim that the imposition of the death penalty was demonstrably race-based in view of a statistical study showing a gross disproportion in death sentences imposed on black defendants.[8] In *McCleskey* the relevant actors included the Georgia State Legislature, the prosecutors involved in the various prosecution resulting in death sentences, and the petit juries which determined to impose death sentences. In rejecting

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7. As in most states, New Jersey law provides that the determining factor in custody cases is the best interests of the child. New Jersey Stats. Ann. 9:2-4.

8. The study showed both that persons who murdered whites were more likely to be sentenced to death than persons who murdered blacks, and that black murderers were more likely to be sentenced to death than white murderers. *Id.*, 481 U.S. at 291, 108 S.Ct. at 1766.

the claim, this Court found most important that the decision to impose the death penalty was based on innumerable factors depending on the circumstances of the particular case. *Id.*, 481 U.S. at 294, 107 S.Ct. at 1768. The second important factor in *McCleskey* was the lack of an opportunity for the decision-maker to explain the statistical disparity. *Id*, 481 U.S. at 296, 107 S.Ct. at 1769. Ultimately, this Court found a "legitimate and unchallenged explanation for the decision...apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty." *Id.*, 481 U.S. at 297, 107 S. Ct at 1769.

The factors considered in *McCleskey* suggest that review of the present case would permit this Court to address the issues raised in the current ferment over gender-based custody consideration. The statistical and social studies sources discussed *supra* at pps. 9-12 of this petition establish the existence of a societal bias in favor of maternal custody which this court can address in the context of this case because, unlike in *McCleskey*, where the defendant did meet the criteria for application of the death penalty, here the petitioner does not meet the criterion for the denial of custody; rather, the evidence overwhelmingly established that the best interests of the child in this case would have been met by awarding custody to the father or joint custody. And, unlike in *McCleskey*, all the decision-makers had not only an opportunity but an obligation to explain their decisions, and they did so in the two decisions of the State courts. As discussed above, these explanation came up short.

By demonstrating that Mr. Giannetti, a male, was by far the more fit parent, but that custody was awarded to Ms. Deock a female, petitioner has established a *prima facie* case of discrimination. *Cf., Batson v. Kentucky*, 476 U.S. 79, 96, 106 S.Ct. 1712, 1723, 90 L.Ed.2d 69 (1986) (prima facie case of

purposeful discrimination in jury selection established by showing that defendant is member of a cognizable racial group and that prosecutor has exercised peremptory challenges to remove members of that group, where other circumstances raise inference that prosecutor used peremptory challenges to exclude potential jurors based on membership in group); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct 1817, 1824, 36 L.Ed.2d 688 (1973) (prima facie case of racial discrimination in employment established by showing membership in racial minority, application for job for which employee was qualified, rejection, continuation of job) . As in the jury selection or employment discrimination analysis, the alleged discriminators here had the opportunity to respond to the prima facie case. The decisions of Judge McVeigh and the Appellate Division, however, did not set forth adequate reasons to explain why maternal custody was continued, given the all but overwhelming evidence that paternal custody was in the best interests of the child. Therefore, the prima facie case was not refuted, and the evidence overall established that the actions of the New Jersey courts were motivated by gender discrimination.

Intentional discrimination generally presents an "elusive factual question." *Texas Dept. Of Community Affairs v. Burdine,* 450 U.S. 248, 255, n. 8, 101 S.Ct. 1089, 1094, n. 8, 67 L.Ed.2d 207 (1981). "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977). The determination may requiring the drawing of inferences from all the relevant facts. *Washington v. Davis,* 426 U.S. 229, 242, 96 S.Ct. 2040, 2049, 48 L.Ed. 2d 597 (1976). In the present case there is a full

basis for making that determination, given the State courts' decisions and the record at the trial court. The issues relating to gender bias in custody decisions are capable of full resolution, and review should be granted by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and order of the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

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NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3001-4T3

BRUCE JOHN GIANNETTI,
Plaintiff-Appellant,

v.

DOREEN RUTH DEOCK,
Defendant-Respondent,

and

CYNTHIA M. DEOCK,
Defendant.

Argued: November 13, 1996 Decided: December 19, 1996

Before Judges Dreier, D'Annunzio and Newman.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Passaic County.

Donald J. Rinaldi argued the cause for appellant.
(Saragail Carpe and Mr. Rinaldi, on the brief.)

Bonnie C. Frost argued the cause for respondent.
(Einhorn, Harris, Ascher & Barbarito, attorneys; Ms. Frost, on the brief.

PER CURIAM

Plaintiff appeals from a post-judgment matrimonial order

denying a change in custody from the defendant mother to the plaintiff father. There were three weeks of testimony. Judge McVeigh, after reviewing her notes, the case law, the testimony and other evidence, fashioned what she considered to be a fair result for the parties and their daughter. Her oral decision, including a few questions by counsel, encompasses seventy-two transcript pages. She continued custody with the mother but extended the father's visitation, and by doing so attempted to maximize his contact with his daughter without moving the child to Georgia, where the mother's contact would have been severely restricted.

We acknowledge the fact that the child, Regan, nine years old at the time of her May 20, 1994 interview with the trial judge, clearly expressed to the judge her preference to live in Georgia and told the father's expert that she wanted to live with her father. We further understand that this might have been influenced by the fact that the father is of greater means than the mother, has a lovely suburban home with a play room, and apparently provides more material things for his daughter, including a horse. However, we have also noted that the father spends more time with his daughter, since his employment permits him to work from home, and he appears to take a more genuine interest in her activities. The mother has turned over many of her parenting duties to her family and spends a good deal of time with her boyfriend, to the exclusion of the daughter. The father, on the other hand, includes Regan in activities with his girlfriend. On the negative side, however, the evidence reveals that the father has in the past refused to alter his visitation schedule to permit his daughter to do things important to her, such as attend birthday parties and otherwise participate in events with her own friends. The father was characterized as "single purposed" and "when challenged...is a force to be reckoned with," but "when he is happy he will give

his all to someone."

The judge declined to recuse herself and also denied that she was biased against plaintiff. Plaintiff raises these issues again on this appeal. The examples given of bias, however, are not of such a nature that we are required to overturn the judge's denial of the recusal motion or to find that the trial was improperly influenced by any bias of the judge.

The child was interviewed by the judge *in camera* on May 20, 1994. The conduct of the *in camera* hearing is committed to the discretion of the trial judge, so long as it complies with *R.*5:8-6. Under this rule, the judge may refuse to pose the questions propounded by counsel, provided reasons are given for such refusal. The judge gave such reasons. She stated:

> I refuse to ask the child some of these specific questions because I find them to be objectionable. I find them to be suggestive and my only concern is [--]not to determine [--] what we can do to preserve this child's mental health and ability, and I refuse to get involved in these petty types of questions.

Some of the questions suggested by plaintiff were asked in substance, but were worked into a compassionate discussion by the judge. The judge did appear to steer Regan somewhat to a statement that she wanted the court to decide with whom she would live because she really wanted everyone "to live together like a family." Regan, however, had already clearly expressed that she liked to be with her father more than her mother, although she wished she could actually spend more time with her mother. She definitely liked Georgia better than New Jersey.

The judge's comment to this nine-year-old girl that "[t]he only thing we girls have to take care of us are our brains

and our ability to take care of ourselves" is not the objectionable sexist remark that is portrayed by plaintiff's counsel. While gratuitous, it appears to be sincere advice from a successful female judge to a young girl. It was as unobjectionable as similar avuncular advice might have been from a male judge to a young boy. Not all same-sex references by role models to young children violate the current vogue of political correctness. The interview process might best be summed up by a quotation from the end of the questioning after eighteen pages of discussion with the parties' daughter.

> Q. And I don't see any reason to put you through a whole bunch of picky questions about who says what and who does what. I needed to get a feel from you as to what you're going through right now, and I think that I have figured out that you don't really want to have to make a decision. You want someone else to do that; right? You have to say yes. [We assume the child was merely shaking her head.]
>
> A. Yes.
>
> Q. Or no, whichever it is. And I think that what you want is both of your parents?
>
> A. Yes
>
> Q. Okay. And I'll do my best to see that we work something out.
>
> A. Thank you.

The bottom line, however, is that the judge saw and heard witnesses for three weeks and rendered a reasoned decision. Our point-by-point factual agreement with that decision is largely irrelevant. The procedural errors raised by plaintiff are insignificant and fall within the principles that the judge had the authority to control the receipt of evidence in her courtroom, *N.J.R.E.* 611(a), and is to be given the wide latitude granted by *R.* 5:8-6

Judge McVeigh was faced with the problem in this case of trying to preserve maximum contact between the child and both of her parents. Plaintiff is wealthy, and his business permits him to operate away from Georgia for several days at a time. His mother's home in New Jersey provides such a base of operations, and also means that he can have uninterrupted visitation in New Jersey for one week per month in addition to the two weekends that he spends with his daughter. The father did not lose this case, although he did not prevail on the issue of a full change in custody. The court provided for "a sharing of residential custody as opposed to a strict visitation setup." Therefore the week that Regan will live with him in Glen Ridge each month and the two additional weeks in the summertime that the daughter will visit him in Georgia, in addition to the weekend visitations, makes plaintiff more of a factor in his daughter's life.

The judge further expressed her reasons for not terminating the mother's primary residential custody. We agree, and note that such a change would have required the child to move to Georgia, with the mother unable to spend any significant period of time with her child. Even thought the father offered to pay for all transportation, the child would either be repeatedly torn from her friends and activities or the mother would be forced into being a weekend visitor. This is true in too many cases, usually with the father placed in this unenviable

position. The trial judge recognized that this family is able, because of the father's unique situation, to keep the daughter in reasonably stable surroundings for the entire school year and have summer visitation for lengthy periods in Georgia, which the young girl so obviously relishes.

We perceive no errors in law. Judge McVeigh, not we, saw and heard the witnesses. We recognize, as did the trial judge, that plaintiff is a father who devoutly loves his daughter, and the judge further recognized both his strengths and deficiencies as a father: his concern and willingness to give of himself and his wealth, versus his aggressive and inflexible nature. The judge also recognized the mother's affection for her daughter, but that her job restrictions and social life required that substantial parenting duties would be delegated to the maternal grandmother. Our review of the judge's decision, which reflected care and analysis, leads us to the conclusion that the parties have had a full and fair hearing as well as a reasoned decision based upon evidence.

Judge McVeigh noted that the parties viewed this lengthy trial as one in which one or the other would win or lose. She stated, "My decision has nothing to do with winning or losing for the parties. This case has been about Doreen and Bruce without regard to Regan. For this Court, this Court has been trying to find out what really is in Regan's best interests." The parties, and plaintiff especially, must realize that this progress from visitation to shared residential custody is to preserve what Regan devoutly desires, maximum contact with both parents.

We also have not lost sight of the fact that the parties' agreement incorporated in their Georgia divorce had provided for defendant to have custody of Regan. A change of custody requires proof of "a change of circumstances warranting modification. *Mastropole v. Mastropole*, 181 *N.J. Super.* 130,

136 (App.Div. 1981). As Regan matures and can express her views on custody, her preference is to be taken into consideration. *N.J.S.A.* 9:2-4C. *See also Ali v. Ali,* 279 *N.J. Super.* 154, 168-69 (Ch.Div.1994), and the cases there cited. Judge McVeigh understood this when she both provided for this new shared custody arrangement and preserved the parties' original agreement for defendant to have the primary residential custody. This arrangement appears to approximate Regan's wishes, at least insofar as the judge determined she could reasonably order at this time. It is up to the parties to make this arrangement work.

We affirm the amended order of custody substantially for the reasons expressed by Judge McVeigh's decision of December 1, 1994.

SUPREME COURT OF NEW JERSEY
C-883 September Term 1996
43,512

ON PETITION FOR CERTIFICATION

BRUCE JOHN GIANNETTI,
Plaintiff-Petitioner,
v.
DOREEN RUTH DEOCK,
Defendant-Respondent

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3001-94 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 23rd day of April 1997.

CLERK OF THE SUPREME COURT

SUPERIOR COURT OF NEW JERSEY
FAMILY PART, PASSAIC COUNTY
DOCKET NO. FD-16-04426-91

TRANSCRIPT OF DECISION

BRUCE GIANNETTI,
Plaintiff,

v.

DOREEN DEOCK,
Defendant.

Place: Passaic County Courthouse
77 Hamilton Avenue
Paterson, NJ 07505

Date: December 1, 1994

Before:
HON. MARGARET MARY MC VEIGH, J.S.C.

Transcript Ordered by:
DONALD J. RINALDI, ESQ.

Appearances:
DONALD J. RINALDI, ESQ.,
Attorney for the Plaintiff
ANN SCUCCI, ESQ.
Attorney for the Defense.

Transcriber Linda Sobala
G&L TRANSCRIPTION, INC.
15 West End Avenue
Pompton Plains, NJ 07444

THE COURT: This case this is Giannetti versus Deock and this case involves the application by a father for a change in custody of a nine year old child. I spent a lot of time going over my extensive notes, all of the document that's been filed in this case as well as other records. And for the record the most significant fact in this case as expressed in their report presented by Dr. Schwartz and I quote, you have to excuse me because I'm recovering from a cold that I just can't seem to get rid of. I can't breathe through my nose and when I talk I'm having a problem breathing through my mouth.

As I said I quote, "neither parent presented with any significant insight or effective awareness of the developmental consequences of the ongoing custody dispute. Neither parent has accessed or is significantly aware of the large body of literature that relate to the current family conflict and its impact on their daughter's development." This is a starting point that I must render my opinion for you and a decision as to the future of Regan Giannetti. First, I will set forth the long procedural history of this case. It becomes before with a long convoluted history. 23 orders involving five different Family Part Judges.

First there was a divorce in or about 1985 for which I have very little information. In May of 1986, Bruce Giannetti and Doreen Deock hereinafter referred to as Bruce and Doreen entered into a settlement agreement filed in the Fayette (phonetic) County, Georgia Family Court which among other things included provisions regarding support and visitation for Regan. Then in 1989 Bruce feeling that Doreen was hindering his communication with his daughter brought an application for contempt in Fayette County, Georgia. On April 5, 1989, the Honorable Ben J. Miller found Doreen to be in contempt in order that she pay Bruce $1,000. These are all things that we found through the records in the Court that I had nothing to do with.

In the spring of 1991 more problems between Bruce and Doreen arose and the case was filed in the Passaic County Family Part.

On March 31, 1991 and on April 5, 1991 there were domestic violence final orders entered by Judge Kestin and Judge Passero respectively. However, these orders maintained the visitation schedule that had been included in the prior settlement agreement. Still there appears to have been both a lack of communication and cooperation between the parties which resulted in another application to then Judge Scancarella.

On May 20, 1991, Judge Scancarella ordered that the visitation schedule set forth in the settlement agreement continue to be followed. He also set forth guidelines for Mr. Giannetti to follow with picking up and dropping off Regan during visitation and ordered a specific visitation schedule followed for particular weekends at issue.

In June of that same year, 1991, Judge Scancarella apparently denied your request for a change in custody and then the parents did manage to enter into a consent order which dealt with Regan's summer vacation, visitation schedule for that upcoming year. It was not a smooth sail from there however because on July 5 there was another Order to Show Cause signed by Judge Ferrante whereby Judge Scancarella would have to determine whether permanent restraints would be set against a Cynthia Deock prohibiting her from being alone with Regan. Judge Scancarella did in fact enter such an order on August 1, 1991.

On October 23, 1991 yet another order was entered ordering various best interests for Regan and payment of medical bills and such by Mr. Giannetti. This order also reiterated that Regan was not to be left alone with Cynthia. Within a month the parties were back in Court requiring Judge Scancarella to sign still more orders.

Again, in November of 1991 Judge Scancarella signed another set of orders when I believe that again included a denial of changed custody. One of the orders dealt with both parties agreeing not to permanently remove the child from New Jersey and some other repetitive particulars i.e. medical expenses and other such matters. I'm just summarizing the history. The opinion orders talk about each party having access to records and such also goes through orders other particulars which had been ordered before and continue to be ordered later.

Interestingly enough on December 5, 1991 Judge Scancarella denied part of an order transferring a complaint from Clifton Municipal Court to the Family Part. However, he did order that the complaint against Cynthia be transferred to the Family Part since the Court actually probably not -- since the Court did have jurisdiction over her pursuant to the prior orders of restraining contact.

It is not until November 10, 1992 that Judge Scancarella signed the next series of orders. This order again mirrored many of the previous orders and simply sets forth the particular visitation schedule and deals with medical bills. But importantly it vacated the order of August 1991 restraints against Cynthia Deock.

In 1993 pursuant to a domestic violence complaint, Judge Scancarella ordered the parties to mediation. Without much success there the parties came back to Court in debating summer vacation again. Judge Scancarella signed an order on June 18, 1993 settling that issue and there was another order on June 28, 1993 correcting some oversights which had occurred in the June 18 order.

My records aren't clear but I do know that I believe that I signed a couple of orders. I know that I had telephone contact with the attorneys indicating what was to happen with regard to certain visitation issues. But then on September 16, 1994 I

signed an order appointing John Fiorello, Esquire, a respected matrimonial attorney and former President of the Passaic County Bar Association as the guardian ad litem for Regan.

The trial of the matter ran over a course of three weeks. I believe it is necessary for the record to comment on three factors that I have isolated from what went on during those weeks. Well, they took up a great deal of the record and the Court's time. They have nothing to do with the decision that I made with regard to Regan's future.

Those three factors are:

1. Trial style of counsel. The record is replete I am sure with requests by the Court to plaintiff's counsel to stop badgering witnesses, to stop yelling at witnesses, and in fact stop yelling at the Court. Mr. Rinaldi is not Mr. Giannetti. Mr Rinaldi's trial style has not and will not be a factor in my decision with regard to Regan.

2. Allegations that the system as a whole is unfair and bias against Mr. Giannetti in his pursuit of his custody of his daughter. There were many references to the system being prejudiced against the father or Mr. Giannetti specifically in this custody battle. This Court expressed on occasion its empathy to that position and a firm belief that this system struggles in the best way that it can to fairly and justly meet the needs of all parties. Counsel and Mr. Giannetti's view of the system has not and will not effect this Court's decision with regard to the best interest of Regan.

3. Allegations of specific bias by myself with regard to Mr. Giannetti's veracity or his gender. This Court values fairness and--to all parties above anything else. This Court's only focus in this case has been and will be what is in the best interest of Regan. Challenges to my demeanor, challenges to my fairness come with the territory. This Court will not allow extraneous issues to impact at all upon my ultimate

determination.

During the three weeks of trial this Court heard testimony from many witnesses. This Court heard from three doctors who were called as experts, Dr. Monty Weinstein, Dr. Gould, a Dr. Schwartz. Initially Passaic County Probation's Department case worker Lea Torre testified. There was factual testimony presented by Miss Betty Simmons of the Division of Youth and Family Services, Sister Caroline from St. Cicero's, Mr. Benis (phonetic), Regan's basketball coach, Mary Gore, mother of Regan's friends, Mr. William Spina, a private investigator, some testimony from Brian Giannetti, and then the parties.

The Court conducted two in-camera interviews of Regan. On a strictly technical ground this Court excluded testimony from defendant's expert. The Court heard from Mr. John Fiorello, Esquire by way of a written report with regard to the testimony of Regan's psychologist, Dr. Lee Rubin Chase. Much of the testimony was out of the normal order because of the availability of witnesses.

I wish to focus first on the testimony of the non-party fact witnesses in this case. Mr. William Spina is a private detective who works with his father Joseph Spina & Associates. Mr. Spina indicated that on or about June 1991 he was retained by Mr. Giannetti to do surveillance with regard to Regan Giannetti. Mr. Spina had also made some video tapes which this Court excluded because defense counsel indicated and plaintiff's counsel agreed that the tapes were not altogether clear nor did they add anything more than the oral report and testimony of Mr. Spina. Mr. Spina testified to his daily surveillance and his observations. It was his testimony that the days chosen for surveillance were designated by Mr. Giannetti. There was surveillance in June of 1991 and then again in February of 1994 for the limited purposes of establishing dates and locations and

those specific observations. Mr. Spina's testimony will be accepted. With regard to the implication or substance of any of those activities, this Court finds his testimony was not probative to the issues to be decided by the Court.

The next factual witness that the court heard from was Mr. Benis. Mr. Benis is or was Regan Giannetti's basketball coach. It was his testimony that practices started in December of 1993 that there were eight to ten practices and about twelve games. The season ended with an awards banquet. It was his testimony that he knew Doreen Deock through seeing her at practices and at games. In addition to seeing Doreen at games he remembered seeing her parents. Mr. Benis remembered that Miss Deock was present at at least half of the games and practices and always took an interest in Regan and asked questions. Regan always had someone who was at the game routing for her. It was his testimony that not all of the parents came to all of the games.

On cross examination Mr. Benis couldn't really describe Regan's grandfather until he saw a picture and said, yes, that was Regan's grandfather. He testified that the reason he remembered Doreen so well is because she really took an interest in her daughter.

Both plaintiff's counsel and defense counsel had subpoenaed Sister Caroline who is the principal of St. Cicero's school. Sister Caroline testified on September 16, 1994. Most of her testimony focused on an incident that occurred in 1991 which has been designated as the DYFS incident. This matter first came to Sister Caroline's attention after a conversation with Mr. Giannetti who asked that she contact DYFS. She testified she didn't see any abuse and she didn't want to get involved with the Division of Youth and Family Services. She agreed to interview Regan. Regan told her that she had been talking with her father, her aunt grabbed the phone out of her

hand and had accidentally hit her and twisted her arm. She went further to indicate the phone hit her in the eye but she maintained it was an accident. She recalls there may have been a black and blue spot over Regan's eye but was not very specified. She was present with Miss Deock when the Division of Youth and Family Services interviewed Regan. She did have a recollection of the Division worker asking Regan not to look at her mother. Her testimony with regard to the incident was at first it sounded like it was deliberate but that Regan clarified that it was an accident. Later after all of the interviews with the Division Regan came to her office one day at lunch time to tell her that the whole story was lie.

Sister Caroline has testified that she was an educator for 47 years and is very experienced with the Division of Youth and Family Services. She made it very clear that she probably would not have called the Division of Youth and Family Services but did so only because Mr. Giannetti insisted. She didn't seem particularly impressed with the Division. There was some indication that antagonism that developed during her testimony. She indicated this is the third time Mr. Giannetti had subpoenaed her for something. She said that she had the feeling that he thinks the school is hiding something from him.

She sends Mr. Giannetti all of Regan's scores, her grades, her records, anything that he has asked for with the exception of the information that's contained in her confidential file. She told this Court that she had been advised by the Diocese and its lawyer that the only person that is entitled to that information is the custodial parent and that custodial parent is Doreen Deock. In fact, Mr. Giannetti as written to the Diocesan office complaining about her and the way that she treats him. This is her testimony. That he indicated to the Diocese that Sister Caroline treats him as a second class father. She emphasized that that's not true, that she treats Mr.

Giannetti just like any other parent and gives him everything, in fact, more than anyone else that has asked.

She described the occurrence where Mr. Giannetti came to school asking to have lunch with Regan and he asked to take her out of class. He wanted to talk to her. Well, she felt this was not normal. She said not that there was anything abnormal about it, but that parents just normally don't come to school to talk to their children or to have lunch with them. She felt that he very much wanted to see his daughter so she allowed Regan to go out on the school grounds to have lunch with her father. It was her testimony that she noticed a behavioral change. Regan was distracted and not concentrating after lunch. She testified to something about hearing, overhearing a conversation in which Regan was told by her father that she shouldn't tell her mother that he had been there, that they would keep it their secret.

Sister Caroline indicated that Miss Deock always comes to home/school association meetings or conferences with regard to Regan. When Regan is having a difficult time academically it was Miss Deock who suggested that there be a tutor.

Although there does seem to be an antagonism between Sister Caroline and Mr. Giannetti, this Court has not reason to doubt the veracity of her testimony or of any toward motivations.

Betty Simmons from the Division of Youth and Family Services testified with regard to the DYFS incident. She's been an investigator with the Division of Youth and Family Services and a family service worker since 1985. She has investigated allegations of abuse and neglect since that time. She was the person that received the referral on Regan from Sister Caroline.

The initial interview that took place with Regan was conducted by Ruth Greene. There was some indication that Miss Simmons had been sick or there was a reason why she

couldn't do it and that Mr. Greene then handled the interview. Her testimony was based solely upon the record of that interview. The referral on Regan indicated that the child was living with her mother and mother's relatives and that an maternal aunt had held the child's mouth while the child was crying. An initial determination was made that this referral did not require an immediate response. They then called the mother on March 18 and setup an appointment. The mother requested time to contact her attorney, but then did comply with the interview.

There was a second interview that was initiated by Mr. Giannetti who requested that interview because the initial one took place in front of the mother and it was his position that the child was afraid and did not give accurate information. The second interview took place in the southern district Passaic office and the mother was not aware of its occurrence. Miss Simmons was present at the second interview only for a period of time. Her absence again at the second interview was because Regan was having problems answering questions and Mr. Giannetti kept saying, "don't you remember what you told Daddy". The supervisor asked him to leave and Miss Simmons went with Mr. Giannetti.

Miss Simmons testified that she also spoke with Cynthia Deock with regard to the incident. Miss Simmons made it very clear that Regan is a very bright child. The concern of the Division workers was that Regan kept changing her story and was inconsistent. Because of her obvious intelligence and inconsistencies the Division could not substantiate abuse. The Division, however, did refer Regan and her mother to counselors specifically to Dr. Martha Page (phonetic) in order to address what they saw as a conflict of problems.

It was Miss Simmons testimony that the phone interview that she had with Doreen Deock on April 8 and during that

interview she was advised that Regan had told her mother that she wanted to live with her father because he could give her so many things. The mother was very upset and went upstairs to make a phone call. The aunt said that she took Regan upstairs to her bedroom and that she was screaming. Regan continued to cry and scream and Cynthia Deock went back into Regan's bedroom, put her index finger to her mouth and told her to please calm down. Miss Simmons was adamant that she really doesn't remember very much because she wasn't present for the original interview and that what she is doing is reading notes from Ruth Greene. The only thing that she did remember was that during the second interview Mr. Giannetti kept interrupting.

Miss Simmons indicated that Ruth Greene felt that both parents urged the child to work out her frustrations, that the child was trying to cope with both of the parents, was causing a tremendous amount of stress.

The Court does have access to and did review the DYFS file that contained all of those allegations. This was done at the request of both counsel. The file does reflect the testimony of Miss Simmons.

Also called to testify was Brian Giannetti, Mr. Giannetti's son by a prior marriage. This Court chose to exclude a portion of Mr. Giannetti's proffered testimony. Mr. Rinaldi's proffer was that Brian would testify about his recollections of his relationship with Doreen Deock and the environment in the Giannetti home around and before 1985. This Court excluded that testimony because it was at such a remote time that the Court did not believe that it had any significant probative value to the best interests of Regan. Further inquired the young man to testify as to the recollections of a child, his perceptions of his stepmother and how that would directly affect her relationship with her own child. When the

Court refused to allow Mr. Giannetti to testify with regard to these issues no further testimony was elicited with the exception of Mr. Giannetti indicating that he had no learning disabilities that he knows of and had always passed all of his courses.

At some point the Court deemed it necessary to appoint John Fiorello, Esquire, as the guardian ad litem for Regan Giannetti for the sole purpose of determining whether or not her treating psychologist Dr. Lee Rubin Chase would be required to give testimony. Dr. Chase and Dr. Fabrican (phonetic) from the Hackensack Medical Center appeared pursuant to subpoenas, but indicated that they did not wish to testify and breach Regan's confidences. Mr. Fiorello spoke with both of them, spoke with Regan, spoke with both parents, and both counsel, and it was his recommendation, his position that Regan's stability requires an ongoing relationship with her psychologist. That that relationship and confidentiality would be breached by their providing testimony in Court, excuse me, and he refused to give permission for them to testify. Counsel for both parties accepted Mr. Fiorello's recommendation that the psychologist not testify and further that Regan continue in therapy with Dr. Lee Rubin Chase because it is critical for her continued development. Counsel had an opportunity to confer with their clients before they entered that agreement and put that position on the record.

Two other witnesses testified on behalf of Doreen. The first was Miss Marsie (phonetic), her employer. Miss Marsie testified as to her relationship with Regan and her mother and their relationship and her mother's work.

Also there was testimony regarding a request for extended visitation by Mr. Giannetti in June of 1994.

Mary Gore testified with regard to the various activities that she and Doreen participated in together with Regan and their other children. It was Miss Gore's testimony that Miss

Deock and Regan were requested not to give out her phone number to Mr. Giannetti during the period of time that Regan stayed at her house while grandfather Deock was sick. Other than those two facts, it was very obvious to the Court that much of Miss Gore's testimony was colored by her being shown the surveillance report by Miss Deock during the summer of 1994.

The Court then had the benefit of hearing from three experts in the area of psychology, psychiatry, and family relations. Additionally, we had the testimony of Lea Torre, a probation officer, who did an investigation with regard to a custody recommendation. While I really don't want to discuss summations at this point in my opinion, the Court is uncertain as to how plaintiff wishes the Court to view Miss Torre's testimony. On one hand plaintiff said that Miss Torre's testimony should not be counted for anything because it was outrageous and then makes reference to certain statements that are alleged to have been made by the parties and Regan to Miss Torre during the course of her evaluation. It is up to the trier of fact to weigh the opinions and the information and testimony that it has been given to give consider or to consideration certain information that has been given as testimony is credible, not credible, or having any relevance or any weight in rendering that opinion.

On the surface Miss Torre's report appeared to be comprehensive, to be inclusive, and to be well thought out. I would be less than candid if I indicated in my opinion that her testimony in Court was more that just a little disjointed. Her demeanor was defensive, her logic and reasoning were convoluted, and in fact her testimony was unpersuasive.

The first expert who testified was Dr. Monty Weinstein whose credentials certainly were inspiring. In fact, most of his testimony had to do with his credentials. Most telling and clearly the most impressive part of this resume is the fact that

from 1985 to present he has been involved in what he classifies is the Family Institute of New York. It is his stated testimony that in order to make a proper decision in regard to a child one must view the family as a group. One cannot possibly treat an individual member without understanding the whole family. He defined it as a systems approach. The doctor testified that he interviewed Regan in the office with her family. That family was defined as Bruce Giannetti, Bruce's mother, his fiancee', and his fiancee's daughter. He interviewed Bruce in his office. He visited his home. He met his fiancee' and Bruce's mother.

In rendering his opinion he reviewed the reports of Dr. Gould, Dr. Farber, Dr. Schwartz, reviewed my initial May interview with Regan, he spoke with Dr. Gould and Dr. Farber, consulted with Mr. Giannetti's attorney, and on the basis of that information he made a determination that without any question Bruce Giannetti should have custody. It is his position that the child "expressed a desire to spend more time and wants to live with him". "She's happier in Georgia". He then spoke at length at how it is critical to place a child with the parent who helps the non-custodial parent relationship with that child to flourish. A parent who doesn't help the relationship to flourish is wrong. This he classifies as a systemic flow of alienation. It was his opinion based upon his information that he had, that the grandparents in this situation are the primary caretakers, that there is a surrogating out of responsibility. He again said that he just cannot understand how anyone can make a decision about a custody recommendation without seeing a child interact with both parents and without seeing both of those parents. He was very upset by Dr. Schwartz's report and assessment of Bruce Giannetti. He said his indication of Bruce Giannetti was that he was a kind, passive individual. That Dr. Schwartz seeing him as assertive and competitive should not be seen as negative. Those qualities are critical to his successes in business

and have made him the individual that he is today.

He was then presented with a series of hypotheticals as to whether or not these demonstrated a showing of a custodial parent responding in the best interest of the child. In the course of discussing one of these hypotheticals Dr. Weinstein discussed separation anxiety specifically as referenced in the model by Dr. Bruno Beddelhim (phonetic) in dealing with the effects of the concentration camp experiences on small children. It was his feeling that and Dr. Beddelhim that separation anxiety doesn't and will not show up for years. Some instances very young children that are subject to separation anxiety wouldn't demonstrate any of the symptoms of the problem until well into their adolescence. His interview of Regan indicated that she was very mature, has very good insights. He indicated that she is a very demanding young lady because she knows what she wants and it's his belief that Regan has indicated she wants to go with her father, that there is not reason to discount her having said that. Her maturity level is that of a level of 12. He disagrees with Dr. Schwartz's position that Regan's expressed desire to live with her father is an accommodation.

On cross examination Dr. Weinstein testified that he never saw Doreen, that he never saw Doreen with Regan, that he did not do any testing. Dr. Weinstein indicated that he had asked from the very beginning to interview Doreen and was of the opinion that there was no effort on her part to cooperate with the evaluation in an open manner. Dr. Weinstein said that he would be surprised to learn that Doreen had never been asked to see him nor in fact that was she told that Regan had been interviewed.

This Court notes for the record that the doctor's demeanor did register some surprise and a little discomfort at the possibility that Doreen had not been asked to be included and to provide him an opportunity for a full assessment. Dr.

Weinstein didn't do any testing because he relied on Dr. Gould's testing and reports from Georgia State and Dr. Page. His assessment of Regan was an empirical assessment. It was his position that in order to do this assessment he met with everybody that he could and he just picked up such "good vibes". He watched Mr. Giannetti and his mother, and Miss Pickles (phonetic), and their relationship with Regan, and it was an excellent, comfortable, close relationship. Again, he indicated Regan was bright, sensitive, cognizant of others, manipulative, demanding and wanted her father's attention. His reflection on Mr. Giannetti was that the man has struggled for years to become involved in his child's life. "This is evident in his over zealous attempt to get school records which were futile". It was the doctor's opinion that this situation that existed clearly demonstrated a case of systemic parental alienation with Mr. Giannetti struggling to constantly remain involved in this child's life.

Dr. Gould's credentials were equally as impressive as Dr. Weinstein's. He saw Bruce Giannetti three times during June and July of 1994. He saw Regan once by herself and once with Bruce. Dr. Gould said that he reviewed the reports of Dr. Schwartz, Dr. Farber, Dr. Weinstein, and that Dr. Weinstein referred Mr. Giannetti to him. It was critical to Dr. Gould in evaluating and making a good recommendation about a family is that the more you were able to see, the clearer the evaluation you were able to make. Bruce is an assertive man who expresses himself with confidence. It is an expression of Bruce's personal self-esteem. Regan has made it very clear to him that she wants to live with her father. She behaves and conducts herself like a young woman rather than a child. She is always included in things that her father does, but not by her mother. Mr. Giannetti is obviously devoted to his child. His opinion is that the accumulation of the facts and the statements that have

been made in this case make it overwhelming that Regan live with her father. It is clear from the same accumulation of facts and statements that while the mother may not be unfit she is careless.

Dr. Gould indicated that he saw Regan after she saw Dr. Weinstein. In reviewing the different factors that came in to play, he claims that he called the Deock home and attempted to setup an appointment with Miss Deock but that some old woman answered who didn't seem to know what was going on and he never received a phone call back.

It is my recollection of the testimony that he made reference to the fact that Regan was jealous of her mother's boyfriend. It is apparent that he also reviewed my interview with Regan because a great deal was made in his testimony of Regan's analogy of the pebbles on the beach. It is like there is more pebbles in Georgia to the fact that the pebbles are indicative of happy feelings that she has in Georgia as opposed to living in New Jersey.

The final expert to testify was Dr. Jack Schwartz. Dr. Schwartz solely for the benefit of the judiciary in Passaic County. Clearly Dr. Schwartz's credentials are not as impressive nor as extensive of those of Dr. Weinstein and Dr. Gould.

Dr.. Schwartz has been employed by Passaic County Probation Diagnostic Unit for an extensive period of time and his entire practice is dedicated to the evaluation of families who are faced with custody and visitation issues and other family type dispute. His initial description of Regan was that she was a very stressed out nine year old. While he didn't make any findings of learning disabilities, he indicated that Regan is self-centered, struggling to be independent with very low autonomous function.

In describing Doreen he indicated that she is socially

sophisticated, that she has the capacity to relate beyond the surface, and has a valid understanding of relationships. It was his finding that the relationship between she and Mr. Giannetti what she classifies as a disaster tended to focus conflicts from her family of origin into the forefront with her. This may at times make her emotionally distant.

Dr.. Schwartz pointed out that at different age levels children have different developmental factors. They have selective memories of what's important and what is not important. They tend to identify with one parent or another at different phases. The choosing of sides and the identification of one parent or the other may not be in the child's best interest even if it is what the child really wants. It was his testimony that Regan is not neglected nor is she dysfunctional. Her problem is that she hears from both parents about the other. Every event in the child's life is a test of loyalty. Again, in discussing Bruce although he indicated there is nothing good, bad, right, or wrong, about personality style, he indicates that Bruce's is uncompromising and shows a great deal of vergitity. There is no other way to look at issues other than his way. It was his opinion that Bruce fails to see his role in the dynamic that is causing stress to Regan. He sees all the conflict to someone's doing. Bruce has trouble tolerating non-aligned feelings. Dr. Schwartz said that during the interview Bruce talked about Doreen as opposed to talking about Regan.

During his interview of Doreen getting information about her was difficult because she talked about Regan. Both Dr. Schwartz's report and his testimony directed attention to the fact that both of these parents continually put Regan in a conflict situation.

Now, that leaves us with the testimony of the parties. There are conflicting and divergent views of various incidents that have occurred over the course of the last ten years.

Specifically that testimony was directed towards a number of issues.

1. The 1986 incident in which Mr. Giannetti was arrested, tried in Clifton Municipal Court with the result in malicious prosecution complaint.

2. The incident involving Cynthia and Regan and the DYFS investigation.

3. The van incident of 1991 in which there are allegations that Doreen and Cynthia sustained personal injury and which resulted in Mr. Giannetti again being arrested.

The other two focuses mainly had to do with Miss Deock's response to certain situations and had to do with the following:

1. The leaving of Regan at home sick while she pursued an evening with her boyfriend which brings up an issue of priority and Doreen's alleged interferences with Mr. Giannetti being able to have additional time with his daughter, most particularly the June of 1994 incidents.

This Court had marked for identification plaintiff's exhibit some 45 documents which about 16 are introduced into evidence. Defendant's exhibits that were marked for identification numbered about 20 and my records show that about 17 were marked into evidence. As I indicated earlier, the Court also interviewed Regan twice, first on May 20 and the second on September 16. It is clear from both of those interviews:

1. That Regan would like to spend more time with her father.

2. That she resents her mother spending time with a boyfriend and not with her.

3. That the child is deathly afraid of losing both parents.

4. That she cannot tolerate much more of her parents conduct.

5. That she currently is very happy at school with her friends and her activities.

Mr. Giannetti testified at length that he was able to spend extensive amounts of time with his daughter as a result of owning and managing his own business. He had and has the ability to re-arrange his schedule so that he is available to Regan in the morning to take her to school, pick her up after school, be with her all afternoon and all evening. It is that his social schedule is not important to him and that he can arrange that social schedule to either include Regan or to meet his own needs when she is not around. Mr. Giannetti detailed for the Court an ongoing struggle from the day that Doreen left Georgia with Regan to date to be able to be an active participant with his child. He had an unusual recall of details from 1985, although when it has to do with one's children I doubt that anything is unusual. He fought for and received when Regan was only nine months old one week a month visitation in Georgia. That continued up until the time Regan went to school. During those times when he had that week he could take the whole week off and stay with her. He never had to go to work when she was around and could handle any problem that came up. He has an office in his home and can arrange that schedule. He admitted that there was one time when he had to use a nursery. He openly admits that communication between he and Doreen is terrible. He has indicated so often that he's going to be in New Jersey and would like to spend more time with Regan, but a maximum of six times during the last nine years has Doreen ever deviated off the schedule to give him more time. He could not understand why when he came to school that anyone would think it unusual for a parent to see their child in school. It was his position "in every situation I always come across as the attacking parent". His testimony delineated all of the incidents that Doreen and her sister Cynthia and her family

have directed at him, the various arrests, the charges, the alleged abuse of Regan, the alleged neglect of Regan, by Doreen in working, and having boyfriends, and placing the telephone in the basement, and sending Regan off to California instead of staying with her or sending Regan back down to him in Georgia.

The most devastating time he indicated very tearfully was when Regan's grandfather died. He had no idea where Regan was. The grandfather was dying and they weren't even talking to him. All he was trying to do was prepare his daughter for her grandfather's demise. He wasn't even given the phone number as to where Regan was and this was discussed later in a telephone conversation that he taped that did become part of the evidence.

Mr. Giannetti said that Regan has been trying to come live with him since she was six years old. It is his belief that telling her mother that this is what she really wanted is what prompted the incident with Cynthia and the child was truly abused as a result of that incident.

In addition to the black and blue mark on her, Cynthia apparently used very foul and abusive language. While Doreen provides an environment for Regan to know her Aunt Cynthia and her grandparents Deock, Bruce's mother who lives less than ten minutes away from the Deock home is kept away. She is not allowed to call or go to visit. In fact, when his father was dying he drove by and attempted to have Regan see his father before he went to the hospital, but Doreen would not allow Regan to go out to the car.

Mr. Giannetti presented to this Court a video tape of life in Georgia. A truly magnificent, well kept home in a very affluent suburb with a beautiful school and well kept neighborhood. Regan has everything at her fingertips including a playroom in the basement. As part of his video he also showed

us the Clifton atmosphere where Regan lives. We are shown the public school that is only two block away from Regan's house and the small, not very impressive St. Cicero's school. The neighborhood around the school was shown on both the videos and photographs marked into evidence with liquor stores and bars right in the area of the school. The school borders on Paterson and there are children from Patterson that attend that Catholic school.

He reiterated that he has no problem caring for Regan, has done so since she was a baby. He still works his schedule around Regan because he can give her quality time as a result of this flexibility. He is afraid that she is left out because none of the neighborhood kids go to her school and she doesn't go to the local school. She has to make an appointment to go play. If she is home sick he would not have to go to his office and can be there with her all the time. He will never need babysitters or grandparents on a consistent basis. He further made the very, I thought gracious statement under oath indicating that it is Miss Deock can show that she doesn't have the money to maintain her relationship with Regan. If Regan does move to Georgia that he would provide the funds to allow that to happen so that money does not become an issue.

On his direct testimony he indicated that Regan does not need therapy. Regan has told him repeatedly how much she wants to live with him. Mr. Giannetti could not understand and pointed out Miss Deock's unwillingness to cooperate. The specific incident that he discussed had to do with his paying for Regan's ice skating lessons on the weekends. He couldn't believe that there was a problem because this was something that Regan wanted, that Miss Deock would interfere.

When he has visitation with Regan they do many, many things. He has taken her to see the Rolling Stones, Whitney Houston, and the Four Tops. They have been to Disneyworld,

to Tennessee, to Hilton Head, and he provides her with every opportunity. He said what he gets from Doreen is to be systematically excluded from Regan's life.

When asked on cross examination whether he has schedules of her activities he said, yes, he does. He acknowledged that Doreen sends him information about birthday parties and appointment that Regan has. He said he never gets any extra time with Regan. However, on cross examination he was asked about a trip to Disneyworld that was not on his time. Regan being able to go to Georgia for a Christmas show of his fiancee's daughter, weekends where there are times he picks her up early and brings her back late. He was even consulted as to whether or not Regan could attend a softball game which was a playoff game that happened to occur during one of his weekend visitations. Regan was part of that team and they had made it to the playoffs. He advised that, yes, he would take Regan to the game. On the morning of the game he called the coach and advised him that Regan's ankle which had been previously injured was bothering her and she could not play.

There are other birthday parties that he acknowledged, he was consulted about, but that he declined to allow Regan to attend because he had made other plans for them for the weekend. Near the end of this vacation Regan was having a wonderful time and he didn't see any reason why she should go home. Doreen had made a big deal of her having to come home because she had to go shopping for uniforms, see her friend, have her hair cut. He felt this was ridiculous because he could do all those things just as well, and that what time was she going to spend with her friends he had no idea if they were special plans. And as far as the uniforms were concerned, you just pick out different sizes and take them off a rack. What difference does it make. It's a uniform. The incidents related by

Mr. Giannetti continued.

Doreen's recitation of those same incidents were very different. She claims that she tries to accommodate Bruce as much as possible. Regan has many friends and any birthday invitations, but so many of them she's had to turn down because Bruce refuses to change plans. She has even offered to change weekends on one occasion so that Regan could attend a very special birthday party.

In her testimony she talked about her daughter's relationship with her parents and her own relationship with her parents. She indicated that living with her parents had enabled her to work without concern. It was her testimony that they had no other responsibility except to be there for Regan while she worked and to provide occasional babysitting services. She was the one that goes to all the conferences. She went to Regan's games all within the atmosphere of a family as opposed to hiring babysitters or child care providers. While her parents are older they are not infirm. Her father was in good shape until the stroke that ultimately killed him.

Her sister Cynthia tends to be outspoken and strong willed. I thought that was a bit of an understatement and obviously never got along with Bruce. It is her feeling that nothing that she ever does with Bruce is right. She calls him and he has something to say about what she told him. If she doesn't call then he has something to say about her not calling.

The time when her father died it was Miss Deock's testimony that she tried to keep Regan's schedule as normal as possible. When the time came that she had to help Regan deal with the reality her father was going to die she gave Regan the opportunity to choose whether to call him or to go visit him at the hospital. Regan chose to go visit her grandfather in the hospital and came home knowing that he was not going to come home himself. She acknowledges at some point Bruce offered

to take Regan, but her real focus was the fact that her father was dying and not knowing how she was going to deal with that. She really didn't want to be bothered dealing with Bruce.

She identified the neighborhood as being a cohesive neighborhood, a friendly neighborhood. She and Regan go to church, to community activities. She has encouraged her basketball, her softball, and her gymnastics. These are all things that Regan has just recently become interested in the last number of years which is consistent with her age group.

She found St. Cicero's School because it provided an opportunity for all day schooling for kindergarten and Regan seemed to be happy there so she continued. She had looked at Montclair Kimberly Academy, but could not afford it. She feels that Regan is doing well at school. While she does have some difficulties, she doesn't feel that they are outrageous. She is concerned that she may not be doing well and continues to slip because of the stress that the child is under and will do anything that she can to help relieve Regan's stress.

She admits to her involvement in all of the incidents that Mr. Giannetti talks about, but gives each one of them a different spin. Most particularly, her choosing to pursue an adult relationship of her own which may or may not have upset Regan. She and Regan have breakfast. They talked everyday after school. She spend as much time at Regan's activities as she can and attempts to include Regan in her relationship with her current significant other Mr.Shankman (phonetic). She has made certain choices about pursuing that relationship, vacationing with him, and caring for her own home life. She has not allowed that to affect Regan. This is her testimony. She and Regan have their own relationship apart from Regan's relationship with Bruce. They do different things. They make plans. They talk to one another.

One of the most significant things that Doreen testified

to was that she had asked Regan who Regan wanted to live with. Regan's response was, I don't know.

I really am not going to go through each and every element that was testified to by the parties. I believe that I have summarized some of the most salient areas and some of the critical testimony.

The Court has additionally listened to at time of trial and re-listened to the tape of Regan's conversation with her father on the phone when her grandfather died.

The following are the facts that have been clearly established at trial. The parties date of marriage, their date of divorce. The fact that until Regan entered kindergarten she spent one week a month with her father. Regan currently attends and has attended St. Cicero's School since kindergarten. Regan is currently in counseling and has been in counseling for a number of years. Regan is very stressed. Doreen and Regan have lived in Clifton for nine years with Doreen's parents. Doreen's parents provide child care for Regan while Doreen works or if she goes out.

In 1986, Bruce was arrested on a plane at Newark Airport. There followed a trial in Municipal Court in which he was found not guilty and filed a malicious prosecution trial in which Doreen Deock was found not guilty and Cynthia Deock was found guilty with damages awarded to Bruce. By way of understatement, Cynthia Deock and Bruce Giannetti do not like one another. Cynthia is currently married, has moved to California, and for at least the last three years the Deock family including Regan have spent part of their summer vacation on the West Coast.

Doreen works for Fire Mart Group and is a valued employee. Doreen currently has and for the last year has been involved with a Mr. Michael Shankman.

Regan has friends in Georgia and New Jersey. Regan

has activities in Georgia and New Jersey, all of which are very different.

In April of 1991 there was an incident involving Bruce, Cynthia, and Doreen, and a van most of which took place in front of Regan.

November of 1991 and 1992, it appears that Judge Joseph Scancarella entered Orders which found no change in circumstances sufficient to even conduct a hearing for change of custody.

Bruce Giannetti is self-employed and owns a company called Amquip (phonetic) Leasing. He is able to run his business on his own schedule and from his home. Bruce owns a very elegant, well-equipped home in Georgia in an affluent community with schools and a community pool. Bruce has visitation with Regan on the first and third weekend of every month, six weeks during the summer, and various other holidays and vacations which neither party specified for this Court.

Regan's elementary school has first Friday early dismissals.

This opinion began with an indication that neither one of the parties has any understanding of the stress level that Regan is under.

I also want to state for the record that this trial was not really conducted on the basis of what is in the best interest of Regan. It was an airing of all of the hostility and grievances between Bruce and Doreen for the last nine years.

Most of the legal argument that was presented by plaintiff's counsel focused on the Supreme Court's opinion in re: Baby M. This Court would never have looked at Baby M as a guide post for making a custody decision. I have to thank plaintiff's counsel for pointing me in that direction because in the process of reviewing all of the relevant case law I reread Judge Sarkow's (phonetic) trial opinion in Baby M as opposed

to the Supreme Court opinion which mainly focused on the surrogate parenting issues. Judge Sarkow's decision as everyone knows was overruled by the Supreme Court, but what I discovered in reading that decision was a wealth of insight into the thorny problems of custody decision. I'd like to quote directly from that opinion. Judge Sarkow in his opening of that opinion states, "there can be no solutions satisfactory to all in this kind of a case. Justice or decided objective to the child and to the mother, to the child and to the father cannot be obtained for both parents. This Court will seek to achieve justice for the child. This Court's fact finding and application of relevant law must mitigate against the heart-felt desires of one or the other of the natural parents. Where the Courts are forced to choose between a parent's rights and child's welfare, the choice is and must be the child's welfare and best interest by virtue of the Court's responsibility as parens patriae. In re: J.R. Guardianship, 174 New Jersey Super 211, 224 Appellate Division 1980. In re: Baby M., 217 New Jersey Super 313 and 323."

Regan wishes her parents could get back together again, that they would live as a happy family. If not, she wishes her parents could exchange one simple word to one another without fighting.

There are a number of ways to approach a custody situation. New Jersey Statute and Case Law says that no one parent has a primary right to custody of a child or children. That it is a co-equal right and responsibility. Terry vs. Terry, I don't have that citation, in New Jersey the Statute is annotated 9:2-4. This Court is provided with various models throughout Case Law of ways for providing for child custody.

King Solomon allegedly according to biblical reference is said to have provided the parents with the alternative of cutting the child in half and each taking half.

This Court has examined all of those possibilities, sole custody with visitation, joint custody, shared custody, I've looked at this Court in terms of Dr. Salks definition of best interests. Dr. Salk was an expert that was relied upon in the Baby M. case.

I agree with plaintiff's counsel that many of those determinations and those criteria might be applicable while some are not. Additionally, there are criteria indicated in that case by Dr. Judith Griffe (phonetic) that have some bearing on this Court's ultimate decision. Many of those criteria now are part of our statutory mandates. Although these two experts were not involved in this trial and did not provide testimony their philosophies and criteria are consistent with those of the New Jersey Statutes. It is , therefore, appropriate that I give some consideration to those views.

I do not find that Doreen Deock is an unfit parent. I do not find that Bruce Giannetti is an unfit parent. I believe that each of these parties love their child tremendously. I firmly believe that neither of these parties have reached a point in their own lives where they have separated their feelings for each other from their feelings for their daughter. The facts are clear that both of them go their own ways in life making decisions, following courses of conduct that satisfy their own needs and demands and not those of Regan. Neither parent is free of blame in this case. It is not a matter of he did this to me so I'll do that to him or she won't do this so I won't do that. This Court has no ability to assess a greater or lesser blame to either party because both of the respond is the character in the Star Trek episode that I requested that you view in which the existence of both entities is dependent upon the hostility of the other.

This case was not tried about Regan. Neither summation presented this case in terms of Regan.

Miss Deock's attorney presented this case in terms of

Charlie Brown. Mr. Giannetti's lawyer presented this case in terms of if we stick to the facts we win. Is this a football game? Are we keeping score? Six points for a touchdown. Three points for a field goal. Two points for a touchback. How do we score the van incident? How do we score Doreen going out when Regan is sick? How do we score Bruce insisting that Regan fly during an ice and snowstorm? How do we classify or score Bruce demanding DYFS investigate not once but twice an alleged incident? Where is there Case Law that tells me how to rate these parents on their abilities? Start from the premise that has governed our court system for more than 30 years.

Neither the father nor the mother has a greater right of custody to their child and the contest between them. Tunney versus Tunney (phonetic), 5 New Jersey Super 392, 397, Appellate Division 1949. If forced to choose between parents rights and children's welfare the choice must be the child's welfare as I indicated earlier. Current statutory mandate with regard to custody indicates a preference for joint custody in making these very difficult decision. In this case it certainly would be the preference of this Court to be able to establish a joint custody situation. I believe that is what Regan would like and I believe that is what would make both of these parties feel fulfilled and protected. The seminal case with regard to joint custody that case that has established the standard by which the Court must operate happens to be a Passaic County case.

Beck versus Beck, 86 New Jersey 480, 1981. The criteria in Beck establishing viable joint custody are as follows:

1. Court determination of whether the children or child has established a relationship with both parents. That they would benefit from joint custody.

2. Are the parents fully capable of physical and psychologically fulfilling the role of a joint custodial parent?

3. Each parent must be willing to accept custody.

4. Each parent must exhibit a potential for cooperation in matters of child rearing.

The Court in re: Baby M indicated that this did not require an amicable relationship, but it does require that the parents isolate their personal problems from their parental roles.

This Courts finds as a matter of fact that Regan does have a relationship with both parents that would benefit from joint custody. Both parents are both physically and psychologically capable of fulfilling the role of a joint custodial parent. Each parent absolutely is willing to accept custody there is no question. However, it is the fourth criteria that causes the most problem for this Court for it is clear that the conflicts that exist in this case are not between Bruce and Regan or Regan and Doreen. The conflicts and the tensions and the core of Regan's current emotional stress is the open, unmitigated, unrestrained hostility between these two parents.

It was clear from the testimony of both parties that they lacked the ability to separate their anger towards one another, their fear of one another, and the ongoing dynamic of their relationship from the independent relationship with their daughter. Even confronted by this Court with an opportunity to mediate and negotiate their own way of resolving the issues knowing that it would be what Regan wanted, the parties were unable to come to any resolution of those hostilities. Under those circumstances, this Court could in no way establish joint custody at this time. It is an unfortunate position for this Court to be in because there are many elements present in this case that speak to joint custody.

Doreen resides in Clifton with Regan. Regan has grown up in Clifton. Bruce owns a house in Glen Ridge, is currently occupied by his mother. Commuting distance between the two homes is allegedly set forth by Bruce to be less than 10 or 15 minutes. Certainly it would provide the best of both worlds for

Regan's best interest. Glen Ridge does maintain a higher standard of living than certain areas in Clifton and as Mr. Giannetti has brought to this Court's attention if that is his concern it would be a viable alternative.

Additionally, there has been some discussion of permanency in the relationship between Doreen and Mr. Shankman. Mr. Shankman currently resides in Florida. The distance between his residence in Florida and Bruce's home in Georgia is closer that even Georgia and New Jersey. The potential is certainly there to work to the advantages of Regan, but that would require a drastic change in the nature of the relationship between Doreen and Bruce. That may, in fact, be impossible.

In closing Mr Rinaldi directed the Court's attention as I indicated earlier to Dr. Salk's defining the best interest in Baby M. Not all of those criteria are applicable.

This Court does not find that Doreen's pursuit of a personal life independent of her relationship with her child to be detrimental to the best interests of that child. The dynamics of interpersonal relationships are critical to how a child develops from birth through adolescence. The whole purpose in parenting and nurturing is to prepare our children to live an independent life when parents no longer exist. While children resent not being the center of a parents whole world the ability to learn that love exists and relationships can grow while another person is involved in other activities and other people is perhaps the greatest gift that we can give children. To teach a child that they are the singularly most important thing in anyone else's life is to create a scenario for failure for them in the future. Parents by the nature of the differences in age and relationships usually die before their children leaving them to grow on their own and alone. Husbands and wives enter interrelationships with other family members. It could be siblings, other needs, and other

requirements. For Regan to be able to develop friendships, intimate relationships and an identity of her own, she must understand how relationships with other people are a give and take and not that of adoration and central importance.

Regan herself in her second interview with this Court pointed out that she had possibly overreacted or over dramatized certain complaints about her mother's relationship with Michael Shankman. It was a recognition. Kids like to be important, and I felt like I should be the most important person in her life. How would Regan have dealt with a younger sibling, someone that needed more attention from a parent than she herself needed? Her responses to her mother's involvement with another person on a more intense level are normal. Along the same lines we are always taught that discretion is the better part of valor. Perhaps Doreen's way of dealing with her and her relationship would not be the way that this Court would approach that relationship. It would not be the way that Bruce would have approached that relationship, but this Court may not impose personal values on other people's lives.

Dr. Salk in the New Jersey Statute say we should look at the following: the emotional stability of the people and the child's home environment, the stability and the consistency and peacefulness in the lifestyle of that family, the capacity of the adults in the child's life to recognize and respond to her emotional and physical needs, the familiar attitudes towards education and their motivation to encourage curiosity and learning, the capacity of the adult in her life to make rational judgments from day to day and particularly in times of crisis, the capacity of the adults in her life to instill positive attitudes about matters of health, nutrition, and the avoidar e of hazards and substance abuse. The remaining criteria that makes sense to this Court is the capacity of the adults in her life to help her develop the resources for coping with life's problems, responsibilities,

and the independence to enable her to become a productive member of society.

Now looking at the facts in this case and how to apply the criteria. Well, Miss Deock does have some emotional problems that are being addressed through counseling. She has not been found to be unemotionally unstable. There was no evidence introduced that indicate she was an unstable person.

Mr. Giannetti while characterized at his worst of being aggressive and inflexible has not been characterized as being unstable.

There is no evidence that Doreen's mother is unstable although she's older. Doreen's life in the household in Clifton is stable. The parties have lived there consistently for the last nine years with the exception of the death of the grandfather. There has been no upheaval or element of uncertainly.

Bruce has experienced the same type of peacefulness in his home life. The lack of peacefulness and stability for Regan comes in the various incidents that have been described between those incidents and the ongoing hostility between Bruce, Doreen, and Cynthia. This hostility will not be changed nor will it be reduced, nor will it be eliminated by a change of custody. The only thing that will change upheaval in Regan's life is a change in attitude by Bruce and Doreen. The capacity of the adults in a child's life to recognize and respond to her emotional and physical needs is one of the most critical issues in this case. Neither parent has the ability to separate their hostility toward one another from dealings with Regan. Both parents continually question her. They continue to lobby with Regan with regard to where she wants to live. I believe from the testimony that I heard i.e. Mr. Giannetti showing Regan schools in the area, introducing her to teachers, that in fact the lobbying on his end for a change in custody has been incredible.

Doreen's lack of recognition that her relationship with

other people may be impacting upon Regan and her inability to discuss that with her shows some lack of insight. However, Doreen has responded with counseling for Regan, has changed counselors when it appears that Regan is not getting anything out of those counselors, and she has hired tutors to help her with school.

The incident that stands out more than anything else in this case is the recent death of Regan's grandfather. There was a lot of testimony about the fact that Bruce felt isolated from his daughter because he couldn't reach her.

Doreen testified that she wanted to keep things as normal as possible for Regan. Bruce indicated he wanted to help prepare his child for the tremendous loss. In fact, he broke down and cried at length in this Court when talking about the issue.

Introduced into evidence was a tape of a telephone conversation that involved Doreen, Regan, and Bruce, that Bruce taped. It starts off with Doreen explaining that Regan will continue to call Bruce until she gets him, that she's at a friend's house, they are attempting to deal with her father's illness. Then Bruce gets Regan on the phone. The voice on the phone and the demeanor on the phone is far from the man who sat in my courtroom and cried. The tone is badgering, confrontational, and manipulative.

Regan is cross examined as to why her mother will not allow him to have the phone number where she is. How do you feel that? Daddy is upset. And then he refers to, have you been thinking about what we talked about. Now, if I recall Bruce claims that the references to the grandfather's illness, however, the time in his voice on that tape belies that statement. Regan then attempts to describe for her father what her grandfather looks like and how she was feeling. Bruce interrupts her. He cuts her off and then his tome goes from argumentative to

almost clawing. This is not the emotional support that a nine year old needed when her grandfather was dying. On the video tape that Bruce showed us was the only other opportunity the Court had to observe Bruce with Regan or to get a feel for that relationship. Regan seemed subdued, overly cautious about what she said, not the bubbly child that I interviewed on two different occasions.

Dr. Weinstein and Dr. Gould had an opportunity to see Regan with Mr. Giannetti and described their relationship as very loving. This Court has no reason to doubt that. Neither one of those experts observed Bruce respond to a crisis situation or to a self discovery situation or to see Regan in those same situations with Doreen.

The next piece of evidence that this Court considered seriously was testimony from both parties that had to do with Regan participating in activities in New Jersey when Bruce had visitation. This factual testimony not only speaks to the capacity of the adults to recognize and respond to emotional and physical needs, but also has to do with the capacity of the adults to help her make rational judgments on a day to day basis and to take responsibility.

Bruce would not alter his visitation schedule to accommodate Regan attending birthday parties or activities of friends here in New Jersey. There was specific reference to a birthday party that Regan really wanted to go to, but Bruce was bringing up friends from Georgia to be in New York and the plans had already been made according to him. The refusal to recognize that Regan needs to participate in activities with her friends here as well as to develop her relationship with her father did not show concern for what Regan's needs were, but more what Bruce's needs were.

The other incident had to do with that softball game. Both parties testified that Bruce was notified in advance there

was a play off game, that Regan's team was involved, that it was on his visitation weekend. He was consulted and agreed to allow Regan to participate. The coach made arrangements accordingly. The morning of the game Bruce called the coach and advised him that Regan's ankle was bothering her and that she would not play. Now, this can be viewed from two different directions. One is that he was responding to her physical needs in not allowing her to play. However, it is not teaching Regan about responsibility and commitment to another group of people. Regan had made a commitment to play with that team on Saturday. In fact, there was testimony presented that Regan played on Monday. This Court make a finding that this action shows Mr. Giannetti's unwillingness to encourage and foster Regan's life in New Jersey nor his willingness to recognize Regan's need for independent activity at all.

A large portion of the testimony focused on an incident in 1991 involving a confrontation between Mr. Giannetti and Cynthia which occurred in front of Regan and resulted in Mr. Giannetti being arrested on the plane.

Then we have the DYFS incident that also involves Cynthia Deock and the incident in 1986 which resulted in Mr. Giannetti being arrested on the plane. What is clear to this Court that went on is that there was a confrontation in the Deock home about the change in Regan's custody. It is clear to this Court that it evoked an emotional response from Doreen. It is clear that Regan was confused, upset, and certainly unprepared for the fact that her mother would be so upset at the idea of her going to Georgia. It was clear that Cynthia may have, in fact, over-reacted and responded irresponsibly to what occurred. This Court can well understand Bruce's fear for his child because of his ongoing hostile relationship with Cynthia. However, he fails to see his own role in the incident and possibly prompting the confrontation between Regan and her

mother and then the trauma of Regan being interviewed twice by the Division of Youth and Family Services only to satisfy his own concerns.

This brings the Court to the issue of parental alienation. Dr. Weinstein and Dr. Gould testified at length about instances of parental alienation and how Bruce was being systematically excluded from his daughter's life. There was no nurturing of the relationship with Regan by the custodial parent. He was cut off from her activities and life as can be seen from his futile attempts to obtain school records and documentation. This Court is confused.

Dr. Weinstein and Dr. Gould depicted a loving, affectionate, close relationship between Bruce and Regan. Dr. Schwartz describes the close, loving, relationship between Regan and her father. Regan tells me that she and her father have a close, loving relationship.

Mr. Giannetti, Bruce, has all of Regan's basketball and softball schedules. That is how he was able to advise Mr. Spina when to go to those games.

Regan tells me her father calls her everyday. Bruce has two weekends a month, six weeks in the summer, and extended other visitations on the holidays that I was not told about, and he has some access to Regan when it is not his regular visitation schedule. I do not see any alienation between Bruce and Regan. In fact, what I see in Regan's relationship and her view of her father is that of adoration. That is not the classic case of a child who is systematically being alienated from a father. A child alienated from her father refuses to go to visitation, refuses phone contact. A child alienated speaks in negative terms about that father. Those are the cases of parental alienation.

Regan being taken to a school in Georgia, showed how beautiful and wonderful it is, having been introduced to a teacher, and told how different her life would be is parental

alienation. Regan being told by her father how upset he is that her mother didn't give him the phone number where she was while her grandfather was dying is parental alienation. Regan not being able to call her mother from Georgia and expressing a concern to this Court that if she lived in Georgia she would not be able to call her mother is parental alienation. Regan being quizzed by her father with regard to her mother's relationship with another adult male is parental alienation. This Court rejects any finding of Bruce being systematically alienated from his child in this case.

I would like to direct this parties attention to in re: Baby M again to Dr. Judy Griff (phonetic). Dr. Griff is a recognized doctor of social work in private practice and, in fact, has been one of the primary spokespersons for joint custody in New Jersey. At that trial she talked about the best interest of the child. She defined a child's best interest as being two basic needs, one, to be loved, to love and feel nurtured, two, a sense of oneness and a sense of opportunity to be separate. This Court has absolutely no doubt that both of these parents enable Regan to feel loved and nurtured, but this Court does have serious questions about Mr. Giannetti's ability to allow Regan to be separate. Bruce's own experts indicate that between the ages of 9 and 11 children are much more interested, develop mentally in themselves and their peers then they are in their parents. Regan herself said to this Court during the last interview, how much do I have to tell my father everyday, routine is the same. She was much more interested in talking to me about basketball, gymnastics, and softball, what she does with her friends, what T.V. she watches, and what she does in school. Bruce himself has indicated that he will be there everyday after school to be with Regan at all times, to drive her here, to take her there. This Court expressed concern to counsel throughout the ongoing time of trial indicating, in fact, that

there might be an element of disappointment for both Regan and Bruce in a custodial situation where Bruce expected to be the daily influence on his daughter's life or even a daily participant in his daughter's life.

Dr. Griff pointed out the primary issue of parenting skills is a capacity for empathy, ability to understand the feelings and needs of the child, to separate one's own needs from the child to encourage autonomy. As I indicated earlier in my opinion, Bruce does not show the ability in dealing with Regan to show empathy or to try to understand Regan's feelings. He has failed to separate his own needs from those of Regan's in order to recognize that her attending birthday parties and activities in New Jersey may be just as important to her as spending the day with him. While it may be lovingly motivated Bruce feels the need to direct how Regan lives her life rather than encouraging her to make decisions on her own.

Doreen's choices may not always be those that Bruce may make. They may not always be the choices that this Court would make, but in making those choices Doreen is teaching her daughter what you gain and lose by making choices. Her testimony which was uncontradicted through cross examination was that in her relationship with Regan she gives Regan choices about what to do within certain parameters. This Court did not give very much credence to the ultimate opinions expressed by Dr. Weinstein and Dr. Gould because there were inconsistencies in both of their testimonies as to who referred whom to who or who to whom. Further, both indicated that the only appropriate way to make a determination with regard to family custody situations was to see the entire family.

Dr. Weinstein at least had the good grace to indicated that he was surprised that Miss Deock had not been advised to setup an appointment with him. But what was interesting from all of the evaluations and what is consistent with all of the

experts and what they saw in Regan and, in fact, the opinion of every lay person that came in contact with Regan is that she is mature beyond her age in certain ways, that she is delightful, bright, demanding , and a bit manipulative. What is also very consistent from all of the examinations is that the ongoing custody battle between her parents is creating unhealthy and unnatural stress for this child. But for the hostility between her parents Regan would be a normal, stabile, happy child. It is not her mother's working nor her mother's dating nor her living with her grandparents that makes her unstable or unhappy. As the Court indicated earlier, a change in custody is not going to dissipate the hostility between the parties.

The last issue this Court must deal with is the fact that Regan expressed to various psychologists the preference to live with her father. She has told her father she wants to live with him. She has told her mother she doesn't know where she wants to live. She told me she was happy she didn't have to make that decision. This Court consistent with Court Rules and case law conducted two interviews with the child and made a record of both of those interviews, in fact, made a record of my refusal to ask certain questions that Mr. Rinaldi had submitted. Case law dictates that a child to be interviewed in Court must be of sufficient age and capacity to reason so as to form intelligent preferences as to custody. The Judge is also required to give due weight to the child's preference. Seminal cases Levine v. Levine, 149 New Jersey Super 269, Appellate Division 1977. That dealt with an eight and a half year old child. That child while lacking the maturity and judgment " to make a dispositive statement of custodial preference" indicated that the child's preference should be considered along with other relevant factors. The Court is not bound by the preference. This Court takes very seriously the fact that Regan did not wish to express preferences to this Court. She did not want to choose. The

Court finds Dr. Schwartz's opinion that Regan indication of a preference to live with her father as an accommodation to be very insightful.

Mr. Rinaldi has pointed out very clearly that Dr. Schwartz's credentials do not equal those of Dr. Weinstein or Dr. Gould, but for all those credentials Dr. Weinstein and Dr. Gould did not have the opportunity to see all these three people. They admitted that it's almost to impossible to make a valid decision without that advantage. Dr. Weinstein and Dr. Gould did not have the credibility that Dr. Schwartz did with this court.

Regan is a very astute child. She is aware of the ongoing conflict of her parents. She is aware of the hostility between them, the distress that it causes her mother and the hostility that it engenders in her father.

In observing the demeanor of Bruce throughout the trial this Court has no doubt that when challenged or not agreed with that Bruce is a force to be reckoned with. The hiring of a private detective to follow Doreen, the scheduling of the second interview with DYFS, the filing of a malicious prosecution lawsuit all show that Bruce is a single purposed individual. When he is challenged or when someone does not agree with him there is nothing that will get in his way. Even the home evaluation from Georgia indicates that Bruce is a single purposed person and that when he is happy he will give his all to someone. Regan is very aware of that. It certainly would make sense to Regan and it certainly would make sense to this Court that the easiest path in this case would be to give custody of Regan to Bruce.

In Georgia Regan has a horse, a big house, a room, a pool, a beautiful neighborhood, fancy vacations, a beautiful lifestyle. In contrast we have poor, middle class Passaic County, Clifton where children from Paterson attend her school. The

school itself is not up to modern capabilities in all areas and, in fact, didn't have a fax machine until Bruce donated one.

If this Court were to rule strictly on the value of pebbles on the beach as being in the best interest of a child, it is clear that the advantages that Regan would have in Georgia materially would outweigh her lifestyle in Clifton. But that is not in the best interest of a child. A child needs to learn to make choices. A child needs to learn to believe in one's own decisions. A child needs to be able to express a contrary opinion to a parent and know that the parent is going to love them regardless. A child needs to be able to learn how to say no and not to be afraid to lose the love of that parent. This Court does not believe at this point in her development that Regan could say no to her father. This Court does not think if Regan wanted to call her mother against her father's wishes that she would feel that she could do that. This Court does not believe by changing custody, visitation complaints, and hostilities would end.

This Court sees nothing different in 1994 than Judge Scancarella saw in 1991. Judge Scancarella in 1991 in the heat of the major confrontational instances testified to by Mr. Giannetti determined that there should be no change in custody. Judge Scancarella reviewed this case in both June and November of '91. Those two reviews took place in very close proximity to the van incident, to the DYFS investigation. Judge Scancarella did not even feel it necessary at that point in time to conduct a hearing. Bruce did not feel it necessary to appeal either one of those decisions.

This Court in the interest of fairness and the hopes that by airing all of the complaints of all of the parties would hopefully put to rest some of the hostilities. Granted this hearing I spent three weeks listening to testimony. This Court interviewed Regan twice out of concern for her well-being. This Court does not find sufficient facts to warrant a change of

custody under any of the standards established either statutorily or by case law and I reference in re: Baby M, Terry v. Terry, 270 New Jersey Super 165, Appellate Division 1994, Matterfeld v. Matterfeld, 10 New Jersey Super 132, Appellate Division 1950, Masterpole versus Masterpole, 181 New Jersey Super 130, Appellate Division 1981, Levine versus Levine, 148 New Jersey Super 267, Appellate Division 1977, Santucci versus Santucci, 221 New Jersey Super 525, Appellate Division 1987, Wilke versus Culp, 196 New Jersey Super 487, Appellate Division 1984, all my own research, and the myriad of other case law decisions regarding custody and the change of custody in the best interest of the child.

Further this Court directs the parties to a book entitled Second Chances written by Judith Wallerstein and Sandra Lackless which discusses the best interest of children in the advance studies of joint custody.

This Court has spent not only three weeks of trial time but six weeks of reviewing notes, case law, testimony, and evidence, in order to fashion a fair result for all the parties in this case. I started off this decision indicating that making a custody decision is not easy, not simplistic, and that no one wins. If we stick to the facts, we win. Do we win in this case? What have we accomplished? My decision has nothing to do with winning or losing for the parties. This case has been about Doreen and Bruce without regard to Regan. For this Court, this Court has been trying to find out what really is in Regan's best interests.

While this Court is unwilling to enter a decision at this point in time changing custody, I am going to make some alterations that establishes a sharing of residential custody as opposed to a strict visitation setup. Commencing with the month of December, Bruce's visitation will be increased by the addition of the third week of the month to be spent in New

Jersey at his home in Glen Ridge with Regan. Bruce has made a great deal in his testimony about his ability to be flexible, his ability to work his schedule around whatever he has to do and whatever he chooses to do in order to be with Regan. He has told this Court that he's in New Jersey on an often basis and that, in fact, there's business opportunities here. I accept that testimony as true and I believe that he is willing to make whatever accommodations are necessary in order to share the responsibilities of being a parent to his child, and I also think that the opportunity presents itself here to make a change in that shared relationship. I am continuing residential, primary residential custody with Doreen, but I believe that this accommodation should allow a greater sharing of quality time between Bruce and his child, and it also accommodates Regan's wishes to spend some more time with her father.

Now if because of certain business arrangements he cannot spend that week he has to notify Doreen by the Wednesday before. While Bruce is in New Jersey and while Regan is living with him in Glen Ridge he is obligated to comply with all of her regular school and after school activities. He is going to be the person to drive her to basketball games in snow, to gymnastics in the snow, to after school plays and activities, to softball games in the summer. She is to have the same ability to contact her mother from his home in Glen Ridge as she does to have the ability to contact her father from Clifton.

With regard to summer vacation, I made some assumptions. I am assuming that Regan will probably get out of school sometime around the 17th of June. Now nobody has provided me with school schedules and possibly I'm going to need to sit down with the attorneys, but my feeling is that from the day she gets out of school for those last two weeks that gives two weeks in the end of June and then I'm going to order that for those two weeks in June and the first two weeks in

August that Regan visit with her father in Georgia. That's a four week block of time. She would then return to New Jersey and spend the last two weeks in July and the first week in August for something approximate that with her mother in Clifton or wherever they choose to vacation. She will then go back to Georgia. My rough calculations for another two week period allowing her to come back to New Jersey for the week before Labor Day so that she could get ready for school.

Now if the time schedules cause some problem I would be happy to sit down with counsel. I looked at a calendar and that looks like what this summer is going to present for us.

MR. RINALDI: Judge, could -- I think we're both confused.

THE COURT: I understand that. I looked at a calendar. If she gets out of school on June 17, there's two weeks left in June.

MR. RINALDI: Okay.

THE COURT: So those two weeks are to be spent in Georgia. The first two weeks in July in Georgia. That's a four week block of time

MR. RINALDI: I'm sorry you had said the first two weeks of August.

THE COURT: No. What I meant, I'm sorry, I've been talking for a long time.

MR. RINALDI: I realize that. The way it added up it didn't add up to four straight weeks.

THE COURT: Then the last two weeks in July and the first week in August she is in New Jersey or wherever Doreen chooses to vacation. Then she's got approximately two weeks to go back to Georgia or wherever she and Bruce decide to vacation and that should leave at least the last week in August, maybe there's another week in there somewhere, but my plan is that she be back in New Jersey for the last week of August so

she can get ready to go to school without a lot of aggravation. During all visitation times well in advance the parents are to exchange where they're going, the name of the hotel, the telephone number for the hotel and an itinerary so that they can be in contact at any point in time.

Regan is to continue counseling with Dr. Lee Rubin Chase at Hackensack Medical Center. Any testing for educational deficiencies that need to be done will be conducted through that facility in cooperation with both Bruce and Doreen. If Dr. Chase feels it is advisable to increase Regan's sessions to once a week, I want a letter from her to that effect and the parties should cooperate with that. Bruce and Doreen are to participate in a family counseling program to be established through Dr. Lee Rubin Chase with a family counselor other than herself that she finds acceptable to both parties. Those sessions should be scheduled, of course, when Mr. Giannetti is in New Jersey. When Dr. Chase feels that Regan is ready to enter that family therapy program that should be facilitated.

Bruce has the first weekend of a month and that usually takes place in Georgia as I understand it. As long as Regan continues in St. Cicero's and it is this Court's finding that I'm sure St. Cicero's will continue first Friday dismissals she should be able to be picked up by either her father or her grandmother outside school to travel to Georgia earl in the afternoon. Whenever either party travels as I indicated earlier the other parent is to have in advance flight arrangements where the parties will be staying, phone numbers. During bad weather if Regan has to fly she will call Doreen as soon as she arrives safely in Georgia.

Bruce is to pay the outstanding balance on any medical bills that have been previously submitted in accordance with his one half responsibility. This Court will not assess any interest on

payment of the medicals. However, plaintiff is not to delay payment of those bills. Any bill that is submitted should be paid within ten days.

Because of the hostility that exists between Cynthia and Bruce it is the opinion of this court that while, of course Regan may visit with her aunt it should not be out of the presence of either Doreen or Doreen's mother and the parties are admonished that there should be no discussion of Bruce or the relationship in front of Regan or while Regan is at Cynthia's house. I mean that just goes without saying as being absurd.

This Court wishes that there was a way to order and to mandate that the parties behave civilly I could. I'm not sure that would do any good, but what I am trying to do is to reduce the hostilities to help Mr. Giannetti spend time with his daughter, quality time in a sharing of that residential relationship that becomes necessary for the growth of the child. I'm going to emphasize again that both parents should have access to all records to medical records to educational records that both parties should participate in any major decisions about the child. That if there's an extraordinary event that occurs such as a traumatic illness or something that the parties should communicate. That there should be nothing disparaging said about either party in front of the other. I think I may have said it to both of you once before. But Regan is one half of each of you and every time that you say something negative about the other party you insult Regan and I don't want to see that go on anymore. I will tell you that if there is any proof of willful or substantial violation of my order about disparaging comments that could invite and revisit the custody situation. Thank you. Miss Scucci, you will prepare the form of Order.

MR. RINALDI: Your Honor, could I just ask you another question. I'm not sure if I took this down correctly. You indicated, you talked about a third weekend here in New

Jersey for Mr. Giannetti.

THE COURT: No, it's not a third weekend. It's a week.

MR. GIANNETTI: Every month.

THE COURT: Every month. He was paying attention, Mr. Rinaldi.

MR. RINALDI: Right. Okay, well, I wasn't sure--

THE COURT: It is to run around that third week, that third weekend visitation. It should be like the third week not the fourth week so it coincides with that--

MR. RINALDI: But it's for the entire week.

THE COURT: Yes, yes.

MR. RINALDI: Okay.

THE COURT: That's I think what I said.

MR. RINALDI: Okay.

THE COURT: You can collect your evidence. Actually, no, I'm going to --evidence pending a 45 day period.

MS. SCUCCI: As you're just going off the bench, but I'm looking and there were a couple of other issues that we asked you to address.

THE COURT: I addressed the medical issues.

MS. SCUCCI: Yes, I know. Well, okay, I mean I guess--

THE COURT: If there's anything else, send me a letter. I don't believe there were any other issues. I'm going to go back on the record because there are other things that neither party presented as evidence. That had to do with the other vacation visitation. I don't know what your arrangements are about holidays. There was no evidence. I believe there are prior Orders. I don't know what your arrangements are with regard to winter or spring vacations.

MR. RINALDI: I think that's all okay.

MS. SCUCCI: That's all fine. Those aren't issues. I'm

concerned that Your Honor still has a letter in your Law Clerk's office which at this point I'm just going to suggest is at a minimum photocopy it so I can at least have a copy. It was the letter that I said that Mr. Rinaldi shouldn't have. It was a communication between--

THE COURT: Oh, you mean the sealed envelope.

MS. SCUCCI: Yes.

THE COURT: That was sitting someplace.

MS. SCUCCI: Yes. That was one of things that needed to be addressed. I'm just trying not to leave any loose ends.

THE COURT: All right, do I copy it and give it to her? I mean I haven't even seen it. I have no idea what it is.

MR. RINALDI: I have no problem, and then I guess you'll retain the original.

MS. SCUCCI: At this point I just want a copy. I'm not going to have--there was one other issue. You had reserved on the payment of Dr. Samuel Spease (phonetic) since he was excluded at the request of Mr. Rinaldi. You had reserved on that in the middle of the trial and I have--

THE COURT: I'll see you and Mr. Rinaldi at sidebar.

(Sidebar Discussion)

THE COURT: My suggestion since I believe that that was not fair play would be that there is a gracious volunteering of the payment of that bill.

MR. RINALDI: Well, first of all, I guess I would like to know how much work he did between--

THE COURT: How much was the bill?

MS. SCUCCI: $2500. She paid--

THE COURT: I believe that it was incredibly unfair.

MR. RINALDI: Judge, what I would like to know is suppose I had--but if I had said no, if I had said I would object to him--

THE COURT: And they went ahead and spent the

money.

MR. RINALDI: No.

THE COURT: That that was their choice.

MR. RINALDI: But, Judge, it's my position that had I objected to the doctor testifying that you would have done with the other objections. You would have reserved it and they would have spent the money anyway.

THE COURT: Possibly, possibly not. The whole time until the day that report was submitted or was to be submitted you maintained that you had no objection to the doctor appearing and testifying.

MR. RINALDI: Correct, Judge, except that, okay, the work was all done before the trial. You're telling me she didn't interview--the doctor didn't interview anybody until after the trial.

THE COURT: She contacted you prior to retaining the expert, right, to see if there would be any objection to her retaining the expert.

MR. RINALDI: That's correct.

THE COURT: You told her no.

MR. RINALDI: And I was told I'd have the report before the trial started and I didn't. I was told I'd have the report the first day of the trial additionally--

THE COURT: What's the difference between--I want to see a copy of the bill. I want to see what the work was for because my inclination at this point in time is at the very minimum that you are entitled to have paid any work up until the preparation of the report a minimum because I believe that it was not in accordance with the way things are done if he was not permitted to testify.

MR. RINALDI: --Judge, you're saying that when I was asked about it--

THE COURT: She relied on you, Mr. Rinaldi.

MR. RINALDI: But when did you first ask me that?

MS. SCUCCI: It was after I received Dr. Weintstein's --all of your reports on about August 12 and it was after that that I discussed with Doreen retaining an expert and I contacted you, discussed it with you, you said go ahead.

MR. RINALDI: Yes, right.

MS. SCUCCI: Doreen proceeded to -- about the way Regan was evaluated. That was heard in the month of August.

MR. RINALDI: Okay, right, that's right. It was done in the month of August. Now, I was told I would have the report before we started the trial.

THE COURT: I want certifications.

MR. RINALDI: Judge, when we were here in Court I was told I'd have the report.

THE COURT: I want certifications under oath from both attorneys.

MR. RINALDI: Fine.

MS. SCUCCI: As to the issue of counsel fees, I just want to confirm that you had indicated -- the Affidavits of Service--

THE COURT: Yes.

MS. SCUCCI: That was concluded as that's still--

THE COURT: Yes. And I will consider both. I will consider Affidavits of Service from both attorneys.

MR. RINALDI: Well, are you--I don't understand that. Are you going to --are you saying you're going to -- shouldn't you first make a decision as to whether or not you're going to allow one side -- make one side or the other pay counsel fees?

THE COURT: I don't have to make that decision none until I see the applications.

MR. RINALDI: Okay.

THE COURT: I assume you're both going to make an application for attorneys fees.

MR. RINALDI: No I wasn't, if she wasn't, but if she is, then I will.

THE COURT: Okay, thank you.

MR. RINALDI: Thank you.

MS. SCUCCI: Thank you, Your Honor.

(End of Sidebar Discussion)

THE COURT: Do not make the attorney fees issued depending on the Form of Order. I want the Form of Order in no later than Wednesday.